TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

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No. 549

VETO GIORDENELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fols. 1-4]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 12,798 Criminal

UNITED STATES OF AMERICA

VS

VETO GIORDENELLO

CAPTION

Be it remembered: That in the above entitled and numbered cause, lately pending in said Court, in which Final *Judgment and Sentence* was rendered at the Regular *February*, 1956 Term of said Court, to-wit; On the *9th* day of *March*, A.D. 1956, the Honorable *Allen B. Hannay*, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

[fol. 5] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

INDICTMENT—Filed February 8, 1956

The Grand Jury Charges:

Count One

On or about the 27th day of January, 1956, within the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one Veto Giordenello did unlawfully, knowingly, and feloniously purchase and have in his possession, a narcotic drug, to-wit: 5 ounces heroin hydrochloride, more or less, which said narcotic drug was purchased by the said Veto Giordenello not in or from the original stamped package and did not have attached thereto the appropriate tax-paid stamps, as required by law. (Vio. Sec. 4704, Tit. 26, USCA).

Count Two

That one Veto Giordenello hereinafter called defendant, on or about the 27th day of January, 1956, within the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, did transfer, sell and facilitate the transportation and concealment of, after importation, a narcotic drug; to-wit: 80 grains of heroin hydrochloride, more or less, which said defendant then and [fol. 6] there well knew to have been imported into the United States contrary to law. (Vio. Sec. 174, Tit. 21, USCA)

(S) T. J. Fusan, Foreman of the Grand Jury.
(S) C. Anthony Friloux, Jr., Assistant United States Attorney.

CAF:lh

In United States District Court

Motion to Suppress Evidence—Filed February 29, 1956

To the Honorable Judge of the Court, aforesaid:

Now into Court comes the defendant in the above styled and number cause and files this his motion to suppress the evidence illegally and unlawfully obtained in the above cause for the following reasons, to-wit:

I

This defendant moves the Court to suppress the evidence of the witnesses Mr. Tom Fendley, an officer of the Bureau of Narcotics of the United States of America and the officer and officers acting in consort with Mr. Fendley on the 27th day of January, 1956, in Harris County, Texas, when said officers unlawfully and illegally searched this defendant. [fol. 7] That said officers will upon a trial of this cause *will* testify to the result of said unauthorized search, the evidenced thus obtained being material to and the basis for the prosecution of this cause. That defendant at the time and place in question had the proprietary possession and ownership of 1 paper bag the contents of which is the

basis of this prosecution. This sentence added in long-hand.

II

For further cause this defendant says that he was searched about his person, papers and effects without a search warrant and without cause.

III

That the evidence obtained by said search in the manner aforesaid was obtained contrary to the laws and constitution of the United States of America.

Wherefore defendant prays that this Honorable Court will suppress the evidence of the witness and witnesses in this cause for the reasons herein set forth and that an order be entered in this cause in compliance with this motion.

(S) Veto Giordenello, Defendant.

(As to the amended part of motion:

3/2/56 (S) Veto Giordenello)

[fol. 8] *Duly sworn to by Veto Giordenello, jurat omitted in printing*

Certificate of Service (omitted in printing)

In United States District Court

[fol. 9] Statement of the Clerk Re Answer of the United States to Motion To Suppress Evidence.

Appellant has designated as a part of the Record on Appeal, "Answer of the United States to Motion to Suppress Evidence". However, it appears from the Clerk's records that no such answer was filed.

V. Bailey Thomas, Clerk. By (S) W. Paul Harriss, Deputy.

[fol. 10] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Criminal No. 12,798

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

VETO GIORDENELLO, Defendant.

Reporter's Transcript of Proceedings Had on March 2, 1956, in Connection with Defendant's Motion to Suppress

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Reporter's Certificate to Following Transcript omitted in printing.

[fol. 11] APPEARANCES:

The Honorable Allen B. Hannay, Judge, Presiding

C. Anthony Friloux, Jr., Esq., Assistant United States Attorney, Southern District of Texas, Houston, Texas. L. Glen Kratochvil, Esq., Assistant United States Attorney, Southern District of Texas, Houston, Texas, For the Government.

William H. Scott, Sr., Esq., Commerce Building, Houston, Texas. Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

[fol. 12] Afternoon Session—March 2nd, 1956

COLLOQUY BETWEEN COURT AND COUNSEL RE. AMENDMENT TO MOTION TO SUPPRESS EVIDENCE

The Court: Please be seated, everyone.

Let me see. The matter today is a matter of a motion, isn't it?

Mr. Scott: Yes, sir.

The Court: Shall I just read it?

Mr. Scott: If the Court please, there was an amendment that I wanted to make, under the rules, to the motion at this time.

The Court: Let me read the original then, and then you tell me what it is. Just have a seat.

All right, I have read the original motion, which was filed on the 29th day of February, 1956. What else did you have?

Mr. Scott: I would like to amend it, either by interlineation, or by dictating to the reporter, as the Court might approve, or have the defendant reswear to that section, and I want to set out that at the time and place in question of the alleged illegal search and alleged illegal arrest, if any, that the defendant had in his possession at that time a paper sack, the contents of which is the basis of this suit, or this styled and numbered cause, to make it more explicit, showing a proprietary interest in the ob-
[fol. 13] ject he had in his hand at the time.

The Court: Was that all?

Mr. Scott: Yes, sir.

The Court: Mr. Friloux, what is your idea on that?

Mr. Friloux: Well, Your Honor, we are ready to go forward here on the motion. Until the amendment, we felt that there were pleadings here that stated no valid ground on the motion for suppression. I believe the amendment of the motion meets the rule now, requiring a proprietary interest, although the wording is rather dubious. We still feel that the rule requires acknowledgment of ownership of the object, and unless that is so stated, of course, we will resist any hearing under Rule 41-E.

The Court: Well, let's make it a little bit simpler. Do you have any objection to the amendment being sworn to and filed at this time, and then we will hear from you with reference to whether you are ready to proceed on the amendment as it then exists?

Mr. Friloux: No, sir.

The Court: Well, if you don't have any objection, then you may make your interlineation.

Mr. Friloux: I have no objection, Your Honor, in the interest of time.

[fol. 14] The Court: Then have it sworn to by the defendant.

Mr. Scott: Mr. McAtee, will you—well, you don't write longhand though, do you?

The Official Reporter: Very little, sir.

Mr. Scott: (Making interlineation in motion to suppress.)

Mr. Friloux: Your Honor, Mr. Kratochvil was to sit with me, but he is on the long distance phone. He will be here in just a moment.

The Court: All right. It will be probably a minute or so anyway.

Mr. Friloux: All right, sir.

Mr. Scott: Veto, come around here, please.

(Thereupon the defendant swore to the amended motion to suppress, before the Clerk of the court.)

The Clerk: Your Honor, Mr. Scott has now put in, in ink,——

The Court: Read it to me.

The Clerk: ——in the first paragraph, beginning after the word, "because"—"The defendant at the time and place in question had the proprietary possession of ownership of one paper bag, the contents of which is the basis of this prosecution," and then Mr. Scott wrote in Roman [fol. 15] numeral number two after that, for the second paragraph.

The Court: Well, to make it clear-cut as well as clear, he is claiming the bag but not the contents of it, is that right?

Mr. Scott: He did not know what the contents were.

The Court: Well, that is a matter of development.

Mr. Scott: Yes, sir.

The Court: Do you swear to that?

The Defendant: Yes, sir.

The Clerk: Do you solemnly swear that the amended motion put in by Mr. William H. Scott, Sr., your attorney, is true and correct, so help you God?

The Defendant: I do.

The Court: All right, are you ready on the motion?

Mr. Scott: May I have him sign this, Your Honor?

The Court: Oh, yes.

(Thereupon the defendant signed the motion as amended, following which the Clerk placed a jurat thereon in longhand.)

The Court: All right, go ahead, gentlemen. All of the witnesses in this matter please stand, raise your right hands and be sworn, all of the witnesses.

[fol. 16] (Thereupon one witness was sworn by the Clerk)

Mr. Friloux: Your Honor, before proceeding, there are two other officers present that I do not contemplate using as witnesses, but there is a possibility, pending the developments, that they may be used in rebuttal, but they are present somewhere out in the hall. Do you want them sworn now as primary witnesses?

The Court: If you don't intend to use them, it is not necessary.

Mr. Friloux: They will be out of the courtroom, Your Honor.

The Court: So if you decide to use them, they will be outside. All right.

I believe you have the laboring oar, Mr. Scott.

Mr. Scott: Shall I proceed?

The Court: Yes.

Mr. Scott: If the Court please, I want to introduce in evidence from the record of this case the proceedings before the United States Commissioner had on the 26th day of January, 1956, with the filing of a complaint without listing any witnesses, made by Mr. William T. Finley, narcotic agent, and for the purpose of identifying it here, I identify [fol. 17] it, and just leave it, since it is papers of the court, court papers.

The Court: Suppose you read it?

Mr. Scott: "That on January 26th, complaint was filed by William T. Finley against Veto, V-I-T-O, Giordenello G-I-O-D-A-N-I-L-L-O," and that is scratched out, and I will explain that later to the Court; it was changed later to "V-E-T-O G-I-O-R-D-E-N-E-L-L-O."

The Court: All right.

Mr. Scott: The original of which is with the United States Commissioner, Mr. William Costa, at Houston, Texas. The copy I have is the papers filed with the Clerk in this case, pursuant to——

The Official Reporter: Please have the Clerk mark it, Mr. Scott.

The Clerk: Defendant's Exhibit No. 1.

Mr. Scott: Yes, sir.

The Clerk: "Duplicate copy of record of proceedings in criminal cases."

Mr. Scott: Being case number 87.

(Thereupon the instrument above described was marked for identification by the Clerk, and same is, in words and figures, as follows:)

[fol. 18] DEFENDANT'S EXHIBIT NO. "1"

UNITED STATES COMMISSIONER, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Record of Proceedings in Criminal Cases

Before: William H. Costa, (Name of commissioner) Houston, Texas. (Address)

Commissioner's Docket No. 1. Case No. 87

THE UNITED STATES

VS.

VETO GIORDENELLO
~~VITO GIODANILLO~~

Complaint filed on Jan. 26, 1956, by Wm. T. Finley, official title, Narcotic Agent, charging violation of United States Code, Title 21, Section 174, on Jan. 26, 1956, at Houston, Texas in the Houston division of the Southern district of Texas as follows: Did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation.

(Here insert brief summary of facts constituting offense charged.)

Warrants or Summons Issued:

Date January 26, 1956 Warrant/~~Summons~~ for ~~VITO GIODANILLO~~ VETO GIORDENELLO (name of defendant) to (name and title of officer) U. S. Marshal or any other authorized officer.

Substance of return: Returned & Executed on Jan. 28, 1956 by arresting def.

Date: —— ——. Warrant/Summons for —— —— to (name and title of officer) —— ——.

Substance of return: —— ——.

[fol. 19] Proceedings on First Presentation of Accused to Commissioner:

Date: January 27, 1956. Arrested by Wm. T. Finley, Nar. Ag.

On warrant of Wm. H. Costa, ~~without warrant~~.

Appearances:

For United States, William Thomas Finley, Nar. Ag., Houston, Texas.

For accused, 1/28/56: John R. Francis (atty.), Houston, Texas.

Proceedings taken January 26, 1956: Complaint & Warrant of Arrest issued. January 28, 1956: Def. appeared with counsel, advised of his rights & warned. Waived preliminary examination and was arraigned.

Outcome: Held for action for the U. S. District Court.

Bail fixed January 28, 1956. Amount, $25,000.00. Bonded —— ——, 19——, by cash deposited by (name) —— ——, Address ——, transmitted to clerk of district court —— ——, 19——, (or) by surety (name) —— ——, Address —— ——, (name) —— ——, Address —— ——, justified by affidavit dated —— ——, 19——, (or) committed to U. S. Marshal on January 28, 1956.

(Back side.)

Subpoenas for Witnesses issued:

—— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of wit-
[fol. 20] ness).

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Preliminary Examination:

(Not to be used if case was disposed of at first presentation.)

Date: —— ——, Appearances for—

United States (name) —— ——, (address) —— ——.

Accused (name) —— ——, (address) —— ——.

Witnesses for United States: —— ——, —— ——, —— ——, —— ——.

Witnesses for Accused: —— ——, —— ——, —— ——, —— ——.

Witness payroll containing —— names certified to United States Marshal for payment, 19——.

Proceedings taken —— ——.

Outcome —— ——.

Bail fixed —— ——, 19——. Amount, $——.

Bonded —— ——, 19——, by cash deposited by (name) —— ——, address —— ——, transmitted to clerk of district [fol. 21] court —— ——, 19——, (or) by surety (names) —— ——, address —— —— and —— ——, address —— ——, who justified by affidavit —— ——, 19——. Committed to —— —— on —— ——, 19——. Certified to be a correct transcript.

Made this 31st day of January, 1956.

Transmitted to Clerk of United States District Court for the Southern district of Texas, January 31, 1956.

(S.) William H. Costa, United States Commissioner.

OFFERS IN EVIDENCE

Mr. Scott: Then I offer in evidence before the Court a warrant of arrest issued out of Commissioner's Docket No. 1, Case Number 87, United States versus V-I-T-O G-I-O-D-A-N-I-L-L-O, together with return of the United States Marshal dated January 26, 1956, and the return, "Received January 28th, 1956, at Houston, Texas, and executing by arrest of Veto, V-E-T-O G-I-O-R-D-E-N-E-L-L-O, at Houston, Texas, on January 28th, 1956. James W. McCarty, United States Marshal, Southern District of Texas, by Kathryn M. Matthews, Deputy.

[fol. 22] The Clerk: Defendant's Exhibit No. 2.
Mr. Scott: Yes, sir.
The Clerk: Warrant of arrest.

(Thereupon the instrument above referred to was marked for identification by the Clerk, and same is, in words and figures, as follows:)

Commissioner's warrant of arrest.

DEFENDANT'S EXHIBIT NO. "2"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Commissioner's Docket No. 1. Case No. 87

UNITED STATES OF AMERICA

v.

VETO GIORDENELLO
~~VITO GIODANILLO~~. V. G.

Warrant of Arrest

To *U. S. Marshal or any other authorized officer:*

You are hereby commanded to arrest ~~VITO GIODANILLO~~, V. G., VETO GIORDENELLO and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with re-
[fol. 23] ceiving, concealing, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation in violation of U.S.C. Title, 21, Section 174.

Date January 26, 1956.

(S.) William H. Costa, United States Commissioner.
(Seal.)

RETURN

Received January 28, 1956 at Houston, Texas, and executed by arrest of Veto Giordenello at Houston, Texas on Jan. 28, 1956.

James W. McCarty, United States Marshal, Southern District of Texas. By (S.) Kathryn M. Matthews, Deputy.

Date —— ——, 19—.

OFFER IN EVIDENCE

Mr. Scott: Then I offer, may it please the Court, the original complaint filed before the United States Commissioner on Docket Number 1, Case Number 87, United States of America versus V-I-T-O G-I-O-D-A-N-E-L-L-O, which has been marked out and the name, "V-E-T-O G-I-O-R-D-E-N-E-L-L-O," with the initials, "V G", being the defendant's initials, "Before me, William H. Costa, Houston, [fol. 24] Texas, the undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, V-I-T-O G-I-O-D-A-N-E-L-L-O," and that is X'd out, and "V-E-T-O G-I-O-R-D-E-N-E-L-L-O" is put in, "did receive, conceal, and so forth, narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code," and it shows that "blank" are material witnesses, and that is signed and sworn to by or before William H. Costa, United States Commissioner.

We offer that as Defendant's Exhibit No. 3.

The Clerk: Defendant's Exhibit No. 3, the complaint for violation.

(Thereupon the instrument above described was marked for identification by the Clerk, and same is, in words and figures, as follows:)

DEFENDANT'S EXHIBIT No. 3

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Commissioner's Docket No. 1. Case No. 87

[fol. 25] Complaint for Violation of U.S.C. Title 21. Section 174

UNITED STATES OF AMERICA

v.

VETO GIORDENELLO
~~VITO GIODANILLO~~. V. G.

Before William H. Costa, Houston, Texas. The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, VETO GIORDENELLO, ~~VITO GIODANILLO~~, V. G., did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that —— —— are material witnesses in relation to this charge.

(S.) Wm. Thomas Finley, Narcotic Agent.

Sworn to before me, and subscribed in my presence, January 26, 1956.

(S.) William H. Costa, United States Commissioner.
(Seal.)

[fol. 26] Mr. Scott: I am trying to eliminate something here, Your Honor.

At the time of the arraignment on January 28th, in each of the exhibits appears, one, two and three, where the name appears as V-I-T-O G-I-O-D-A-N-I-L-L-O, it was changed

to V-E-T-O G-I-O-R-D-E-N-E-L-L-O, and I will further state for the Court to further clarify it that at the time they were changed, the defendant was present with his attorney, and he initialled that change.

Mr. Finley, would you take the stand?

Mr. Friloux: Your Honor, preparatory to questioning this witness, we object to any further proceeding, and we feel the stipulation in the motion that is before this Court is still not within the ruling required under the Fourth Amendment, and the suppression motion now shows that they acknowledge possession or ownership of the bag, but not ownership of the contents of the bag, and I don't believe that, until that issue of ownership and possession is adequately cured, that we can go forward into the merits of the arrest, and so forth, because until such time as that question is settled, then it is just a fishing expedition, I think.

I know there is a late case of Lovett versus U.S. just out [fol. 27] of the Fifth Circuit which I think the Court is aware of that states the law on that point, and which states this: no point of law is more firmly settled than that,

"The guarantee of the Fourth Amendment against unreasonable searches and seizures is personal and can be raised only by one who, at the least, claims ownership or possession of, or connection with the premises searched or property seized and defendant who denied any interest in property searched and seized was not entitled to motion to suppress evidence thereby obtained."

Until such time as that is clearly stated or shown that the property seized was in possession of or ownership of this man, we object to any further procedure. The law is also clear there is no standing to be heard.

Mr. Scott: He raises that question by his sworn motion, may it please the Court.

Mr. Friloux: It is merely an allegation and no proof, and I think there is a legion of cases to that effect.

The Court: I will hear him, subject to your motion.

Mr. Friloux: All right, sir.

The Court: Who will you call first?

Mr. Scott: Mr. Finley, please.

[fol. 28] WILLIAM THOMAS FINLEY, being called as a witness by the defendant in support of his motion to suppress, having been first duly sworn on oath, testified as follows:

Direct examination.

Q. (By Mr. Scott) Please state your name, sir.

A. William Thomas Finley.

Q. Mr. Finley, what official position do you hold for the United States Government?

A. I am an enforcement agent for the United States Treasury Department, Federal Bureau of Narcotics.

Q. You held that position on the 26th day of January, 1956, and prior thereto?

A. I did, sir.

Q. You are the same William T. Finley who signed the complaint for violation of the U. S. Code, Title 21, Section 174, against a man named V-I-T-O G-I-O-D-A-N-I-L-L-O?

A. I am.

Q. And I exhibit to you now Defendant's Exhibit No. 3. That is your signature?

A. It is, yes, sir.

Q. I notice, Mr. Finley, that on the complaint for violation, you do not list any witnesses.

A. Yes, sir.

[fol. 29] Q. Now, did you, of your own knowledge at the time you made this complaint, know that one V-I-T-O G-I-O-D-A-N-I-L-L-O had in his possession any heroin hydrochloride?

A. That V-I-T-O G-I-O-D-A-N-I-L-L-O that you spelled there, is the same—if the answer to that is "yes"—then that is the same as the defendant V-E-T-O G-I-O-R-D-E-N-E-L-L-O.

Mr. Scott: Just a minute, Mr. Finley.

Your Honor, I move that the answer be stricken as not responsive to the question.

The Court: Overruled.

Q. (By Mr. Scott) I said, of your own knowledge did you know at the time you made this affidavit that V-I-T-O G-I-O-D-A-N-E-L-L-O had received and concealed heroin hydrochloride?

A. To reiterate my answer, if the Veto Giordenello, G-I-O-R-D-E-N-E-L-L-O, that is your client, that you are referring to, I had probable cause to believe that, yes.

Mr. Scott: That is a conclusion. I move that it be stricken.

The Court: Overrule your objection.

Q. (By Mr. Scott) Did you have any knowledge of your own, had you seen him, or did you know of his receiving and concealing heroin hydrochloride, you, yourself?

[fol. 30] A. Had I received any?

Q. Yes.

A. From Veto Giordenello?

Q. Yes.

A. Had I received——

Q. Had you seen him receive or conceal any heroin hydrochloride?

A. No, sir.

Q. Then the complaint for violating that you signed was not made on information or upon facts, I mean upon facts known to you, or to your personal knowledge?

Mr. Friloux: That sounds a little argumentative with his own witness. I ask him to rephrase the question.

Q. (By Mr. Scott) Of your personal knowledge did you know, in fact, that Veto Giordenello received or concealed heroin hydrochloride?

A. I believed that I did, yes.

Q. I said of your own knowledge.

A. My own knowledge, meaning information?

Q. No, sir, I am not talking about that. I am talking about what you, yourself, know.

A. Well, my knowledge was based upon my information.

Q. I will get to that in the next question. Of your own personal knowledge you didn't know any facts, did you?

[fol. 31] Mr. Friloux: Your Honor, I am going to object to him leading his witness and giving him a double-barreled question on top of that.

Q. (By Mr. Scott) From this——

The Court: Reframe your question.

Mr. Scott: I am speaking of what you knew, what you had seen, heard, or arrived at by your senses.

The Court: Yes, that is all right.

A. I had heard and arrived at by my senses——

Mr. Scott: I don't mean——

Mr. Friloux: I object, counsel. Let the man answer the question.

The Court: Let him answer it. Don't interrupt him until he has finished his answer. I do not permit that in this court.

Mr. Scott: Excuse me, but I don't think I made my question clear to him.

The Court: Nevertheless, let him answer it, and then if you want to make a motion to strike, you have that privilege.

Mr. Scott: I would like to withdraw my question.

The Court: I am not going to let you. I will let him finish his answer. I do not tolerate that type of interrogation by any lawyer in this court.

[fol. 32] Mr. Scott: Yes, sir.

The Court: Read him, Mr. Reporter, the question and the answer as far as he had gone before he was interrupted by counsel.

The Official Reporter (Reading): "Question: I am speaking of what you knew, what you had seen, heard or arrived at by your senses.

"Answer: I had heard and arrived at by my senses——"

The Court: All right, finish your answer.

A. —the information upon which the probable cause is based.

Q. (By Mr. Scott) Yes, sir. Excuse me, Mr. Finley. What I meant to ask you was had you seen with your senses Veto Giordenello do anything with reference to receiving and concealing the narcotic drugs, to-wit: heroin hydrochloride?

A. I don't mean to be argumentative, Mr. Scott, but I had seen him by my senses, you say, I had heard—I hadn't seen with my eyes, but that was the previous question.

Q. Yes.

A. I hadn't seen Giordenello with narcotics in his possession, no.

Q. Then this affidavit you made was based on what some-

[fol. 33] one had told you?

A. Not entirely, no, sir.

Q. Well, now——

A. The information that I received was not based entirely upon what I was told. I had maintained surveillance upon Giordenello. I had received information from more

than two sources whereby it would indicate that Giordenello was in possession of the heroin at the time that I swore to it.

Q. All right. Yes, sir. Now, that information was from informants?

A. Not entirely, no, sir.

Q. Well, were those people available, Mr. Finley, to have signed the complaint?

A. Which people are you talking about?

Q. The people other than informers? You said people other than informers had given you information. Were they available to have signed the complaint for violation of U. S. Code Title 21, Section 174?

A. By "available", what do you mean?

Q. Well, could they be taken before the Commissioner, or could you have obtained affidavits to be filed with the Commissioner?

A. I swore to the complaint myself on the basis of their information.

[fol. 34] Q. Yes, sir, and that is the only reason that you swore to it, was on the basis of the information given you?

A. No, sir, not entirely. I had kept a surveillance on this man beginning the latter days of December, as I said before, and was in possession of information which corroborated my surveillance, and vice versa my surveillance corroborated my information that he was in Houston, and planned to go to Chicago, Illinois, to bring back a large supply of heroin, and he did leave, and he did return, and my surveillance did corroborate that information. In addition to that, I received information from other law enforcement officers that he was in town with that large quantity of heroin.

Q. Now, Mr. Finley, my question was, outside of the informers, were the people who knew the facts set forth in the complaint for violation of Section 174, Title 21, did they live in Houston, or were they available to have been taken before the United States Commissioner, or for you to have obtained affidavits from them to be filed with the United States Commissioner?

Mr. Friloux: I will object first. It asks three questions at one time. If he will break it up——

The Court: You had better cut it down. It is a three-way compound question.

[fol. 35] Q. (By Mr. Scott) First were the people that gave you the information other than informers?

A. Yes, sir, they were.

Q. Were they residents of Houston, Harris County, Texas?

A. I believe they are, yes, sir.

Q. The next question, were they available on the 26th day of January, where they could have been taken before the United States Commissioner?

A. I don't know whether they were or not at that particular time.

Q. Did you attempt to find out?

A. Well, it didn't enter my mind whether they were available to swear before the Commissioner or not.

Q. Did you make any attempt to locate them to take them before the Commissioner?

A. Not for that purpose, no, sir.

Q. Did you obtain any affidavits from them to be filed with the United States Commissioner?

A. No, sir.

Q. Mr. Finley, you did not at any time obtain a search warrant to search the premises or the person of Veto Giordenello, did you?

A. The premises or the person?

Q. Yes.

[fol. 36] A. No, I didn't get a search warrant, no.

Q. You were in possession of the facts as you have related them, as you have told us, on the 26th day of January, weren't you?

A. I was, yes, sir.

Q. And on the 27th day of January?

A. I was.

Q. You arrested Veto Giordenello on the 27th day of January, did you?

A. Yes, sir, I did.

Q. You didn't have a search warrant?

A. A search warrant, no, sir.

Q. Did you have in your possession at that time to exhibit to the defendant a warrant of arrest?

A. I did.

Q. Did you execute that warrant of arrest?

A. I did.

Q. Did you make the return to the United States Commissioner in this court of the warrant of arrest as executed by you?

A. I gave it back to the United States Commissioner, yes.

Q. You didn't make a return on it?

A. By return, I gave it back to the Commissioner after I had executed it.

[fol. 37] Q. Did you report it into court? I mean this is not your——

Mr. Friloux: Your Honor, I object to this line of interrogation, the way counsel is first telling the witness what he wants him to say. He is leading him, and this is his witness, however adverse the proceeding might be, and I would like for the Court to remind counsel, however learned in years he may be, to refrain from doing that.

The Court: Hurry along. Make your objection.

Q. (By Mr. Scott) All right. I show you Exhibit No. 2, which is a warrant of arrest. The return shows it was executed by the United States Commissioner on the 28th day of January, 1956. I will ask you if you executed another warrant of arrest other than the one I show you that was executed by the United States Marshal.

A. Well, I have no identifying marks on this warrant to show me that it is the warrant I gave back to the Commissioner. I gave a warrant back to the Commissioner.

Q. Well, if you executed a warrant of arrest, you would make your return on it, wouldn't you?

A. To the United States Commissioner, yes.

Q. Did you make one?

Mr. Friloux: Your Honor, first I don't think we are [fol. 38] arguing legal terms, execution and return, and I don't think this officer understands the terms.

The Court: Did you return it to him, whether or not you did any writing on it or not? I think that is the question he is asking you. Did you write on it, or return it without writing on it?

A. I returned it to the Commissioner.

The Court: Without writing on it?

A. Without writing on it, yes, sir.

The Court: Go ahead.

Q. (By Mr. Scott) You don't know whether this Exhibit 2 is the warrant you had or not?

A. I don't know that now, no, sir.

Q. Mr. Finley, on the 27th day of January, you saw the defendant at his home, or near his home, at 2901 Airline Drive, didn't you?

Mr. Friloux: I object to his leading questions.

The Court: All right, don't lead the witness.

Q. (By Mr. Scott) All right, did you see the defendant on the 27th day of January, 1956?

A. I did, yes, sir.

Q. What time of day?

A. At about 6:00 p.m.

Q. At what place?

A. In the area of 2901 Airline Drive, Houston, Texas.

[fol. 39] Q. What was he doing out there?

A. He returned to his home there in his car.

Q. Did you have the warrant of arrest then?

A. I did.

Q. Did you execute it?

A. Later I did, yes, sir.

Q. Answer, did you execute it when you saw him?

A. When I first saw him?

Q. Yes.

A. No, sir.

Q. Was there anything to keep you from placing him under arrest at that time?

A. I felt so, yes, sir.

Q. He was present in the area of 2901 Airline, and you were present there?

A. Yes, sir.

Q. No one kept you from executing your warrant of arrest, did they?

A. I kept myself from it.

Q. Yes, sir. Then, Mr. Finley, you say you kept yourself from executing the warrant of arrest. Let me ask you this question: wasn't it your intention to execute the warrant of arrest so you would have the opportunity to search the defendant?

A. I beg your pardon. Would you repeat that?

[fol. 40] Q. Wasn't it your object—you could have placed him under arrest there at 2901 Airline, couldn't you?

A. I had the warrant, yes.

Q. You could have?

A. Yes.

Q. Wasn't it your purpose in not placing him under arrest then to later, at some future time, either later that night or that day, to serve that warrant so you could search the defendant?

A. No, sir, that was not the purpose for my waiting to execute the warrant. This was an investigative technique on my own. It was a decision I made myself.

Q. Do I understand by that that the whole procedure was an investigative technique by you?

A. No, not the whole procedure; no, the execution of this warrant was. The investigation, as I have stated before, started before Christmas on Veto Giordenello, and there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant.

Q. Well, from the time of the investigation up until the time you arrested him, you, yourself, never did see him do anything wrong, did you?

A. I wouldn't say that, no, sir. I couldn't answer no to that question.

[fol. 41] Q. I mean violate any of the U. S. laws.

A. Well, that is a difficult question to answer. I wish you would rephrase it, or reword it, if you possibly can, so I can better understand it.

Q. Well, it is not my attempt to trap you in any question. I say from the time the investigation began until the 27th or 26th day of January, you never saw Veto Giordenello violate any of the laws of the United States of America, did you?

A. Not that I am prepared to prove now, no, sir.

Q. Yes, sir, and you didn't see him on the 26th, prior to the time that you swore out that first warrant, did you?

A. I beg your pardon, sir?

Q. You hadn't seen him violate any law at the time you swore out the first warrant on January 26th, had you?

A. That is the same answer. I can't say no to that question.

Q. But I am speaking of your knowledge, Mr. Finley.

A. Well, of my own knowledge I would say that the answer to your question is no, or rather it is undetermined. It is not no, and it is not yes, that I am prepared to prove or state now.

[fol. 42] Q. Did you see him on the 26th at all?

A. Yes, sir.

Q. And you could have served the warrant then on the 26th, couldn't you?

A. Well, the warrant was issued on the 26th, it was effective on the 26th, and I saw him after the warrant was issued.

Q. Yes, sir.

A. And it was effective, so I could have served it I suppose.

Q. Yes, sir, and you didn't arrest him then?

A. No, sir, I didn't.

Q. And you had the warrant?

A. Yes, sir.

Q. Now, Mr. Finley, weren't you just keeping that warrant so that you would have the excuse to search him at the time you executed the warrant?

A. No, sir, I didn't get the warrant for that purpose.

Q. Wasn't that your purpose?

A. No, sir, it was not.

Q. Well, at the time you did arrest him on the 27th, you hadn't seen him violate the law before you served the warrant, had you?

A. That is the same question again, Mr. Scott. I can't say whether I did or didn't at this time.

[fol. 43] Q. I will ask you the question this way: you went out in the vicinity of Lathrop and Brownsville Streets, didn't you?

A. On the 27th day of January, 1956, yes, sir.

Q. And you parked at or near a grocery store across the street from a house——

Mr. Friloux: Your Honor, I hate to object or to be picayunish, but this is straight across the board leading in every statement counsel asks of the witness, and I would like to ask him to rephrase his question properly.

Q. (By Mr. Scott) Well, on the——

Mr. Friloux: I will object to it for that reason, Your Honor.

Mr. Scott: Excuse me.

The Court: Go ahead.

Q. (By Mr. Scott) On the evening of January 27th, 1956, did you go out in the vicinity of Brownsville and Lathrop Streets?

A. I did, yes, sir.

Q. Were you in an automobile there?

A. Yes, sir.

Q. Did you park your car?

A. I did, sir.

Q. Where?

[fol. 44] A. Just off of the intersection of Brownsville and Lathrop. I believe it is the northeast corner of that intersection.

Q. Did you see the defendant Veto Giordenello there?

A. I did, yes, sir.

Q. What was he doing?

A. Well, he was doing several things during the time that I saw him.

Q. What did you see him do prior to the time you——

A. I saw him drive his 1955 Cadillac; I saw him get out of that Cadillac; I saw him go into an address at 6827 Brownsville Street; I saw him come out of that address; I saw him go into a garage; I saw him come out of the garage——

Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?

A. As he attempted to approach his Cadillac, yes, sir.

Q. He was still in the yard, wasn't he?

A. I believe he was just at the end of the fence there.

Q. I will ask you if there was a garage there in the rear of the premises you have just described on Brownsville?

A. That is the one I saw him come out of.

[fol. 45] Q. Are there any doors on that garage?

A. Well, there are two—there is a front door and a door that the car would ordinarily go in.

Q. Yes, sir.

A. And a side door.

Q. With reference to the door that you saw the defendant at or by; was that the front or the side door?

A. Well, the side door, where a person would enter, a small doorway.

Q. I will ask you if there is a fence about the premises that you have described on Brownsville Street?

A. There is a fence.

Q. What type is it?

A. A metal fence.

Q. Do you know what they generally call those fences?

A. A link chain fence, or Cox fence, I believe, or something.

Q. Does that fence surround the side door of the garage?

A. I would reword your question in answering it, in that the side door of the garage is within the fence, yes, sir.

Q. That is what I meant.

[fol. 46] A. Yes, sir.

Q. I will ask you where you saw the defendant with reference to the side door of the garage?

A. I saw him enter that door and return from that door to the outside.

Q. And then you arrested him, did you?

A. Well, not at the door, no, sir.

Q. Where was he when you arrested him?

A. He left the area of the door, and as I say he was approaching the fence entrance, as he goes out towards the road, which would be Lathrop, I believe.

Q. I will ask you whether or not he had gotten outside of the fenced premises?

A. He was at the gateway. The gate was open, or there was no gate on it, but he was at the space there, he was just, I should say better, right alongside the gate, right at the outside of it.

Q. Did you have a warrant to search the premises that you have described on Brownsville Street?

A. I did not.

Mr. Scott: We rest, Your Honor.

Mr. Friloux: Do I understand that he rests prior to my having a chance at cross examination?

Mr. Scott: I mean that is all of the questions to this witness.

[fol. 47] The Court: Let's understand it. You mean you pass the witness, or that is all of the testimony you are offering?

Mr. Scott: May I ask one more question, Judge?

The Court: Answer my question first.

Mr. Scott: That will be all after one more question, all of the testimony we will offer by this witness.

The Court: From this one witness?

Mr. Scott: Yes, sir. May I ask another question?

The Court: Yes, sir.

Q. (By Mr. Scott) Mr. Finley, did the defendant have anything in his hand at the time you arrested him?

A. He had a substance which has been chemically analyzed and proven to be heroin hydrochloride to the amount of five ounces and some-odd grains.

Q. Did he have a paper sack in his hand?

A. This heroin hydrochloride was contained in the paper sack and other wrappings.

Q. He had a brown, or was it a brown paper sack?

A. Yes, sir, it was.

Q. That was in his hand?

A. It was, yes, sir.

Q. And what you are testifying about as to the substance that was in that sack?

[fol. 48] A. Yes, sir.

Mr. Scott: Yes, sir. We pass the witness, if the Court please.

Mr. Friloux: Pass the witness.

The Court: Stand aside. Call your next witness.

Mr. Scott: We rest, Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friloux: At this time, Your Honor, at the conclusion of the case in chief for the petitioner, the Government would move that the petition be disallowed, first on the grounds that this is a hearing primarily concerned with the validity of a warrant and based on probable cause.

The testimony by the witness, the only evidence which was brought in by the petitioner himself, shows that the warrant was issued, and the warrant itself is in evidence, and the act of the officer in getting the warrant has been brought out very clearly, that it was issued on probable cause and other activities.

Now, without further arguing, we move that the Court deny the petitioner's relief requested right now. We don't

feel that they have met the burden of showing any illegality, and there is no showing of the most basic element, that of possession. There is no affirmative evidence in the record that this man acknowledges possession or owner-
[fol. 49] ship of it. I don't believe that they can do it in the manner requested.

We therefore move the Court to disallow the petitioner's relief.

(Following argument by counsel for both sides the Court made the following announcement, and the following proceedings were had:)

The Court: All right, I will mark it submitted, and appear back in this court room with your client on Monday at 10:00 o'clock.

Mr. Scott: Yes, sir.

Mr. Friloux: Your Honor, in order to be sure I understand the proceedings, we have not formally rested.

The Court: Oh, well, I didn't understand that. If I am going to pass on this motion——

Mr. Friloux: I want to state to the Court that we have now, for the record here. I didn't make the statement in the record that I have rested.

The Court: Don't try it by piecemeal.

Mr. Friloux: No, sir.

The Court: If you have any evidence, let's go into it.

Mr. Friloux: No, sir, we are standing as is, but I wanted to be sure the record reflected it.

The Court: Yes, sir. I am sure it does.

[fol. 50] Mr. Friloux: Yes, sir.

The Court: Court will stand adjourned under the rule.

[fol. 51] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings—February 5, 1956

I, Howard J. Boland, deputy official shorthand reporter for the United States District Court for the Southern District of Texas, hereby certify that the following is a true and complete transcript of the proceedings had before His Honor, Allen B. Hannay, Judge of said Court, on the

5th day of February, 1956. Witness my official hand this 28th day of May, 1956.

Howard J. Boland, Substitute Official Reporter, United States District Court, Southern District of Texas.

[fol. 52] APPEARANCE:

James T. Dowd, Esq., Assistant United States Attorney, Houston, Texas. James E. Ross, Esq., Assistant United States Attorney, Houston, Texas, For the Government.

William H. Scott, Sr., Esq., Commerce Building, Houston, Texas. Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

[fol. 53] Morning Session—Feburary 5, 1956

DENIAL OF MOTION TO SUPPRESS EVIDENCE

The Court: Criminal Number 12, 798, United States of America versus Veto Giordenello. On the motion to suppress, motion to suppress is overruled.

Mr. Scott. Note our exception.

The Court: On the merits, 12,798, U.S.A. versus Veto Giordenello, what says the Government?

Mr. Dowd: Is the Court calling that as the first case on the docket to be tried?

The Court: Yes, sir.

Mr. Dowd: In that case, Your Honor, I would like to say we would not be ready until about 2:00 o'clock this afternoon.

The Court: We probably won't have a jury anyway. I don't believe we have enough for our situation this morning. I wanted an announcement.

Mr. Dowd: We will be ready by then.

The Court: Ready?

Mr. Scott: Yes, sir.

The Court: You may go until 2:00 o'clock, then.

[fol. 54] Afternoon Session—February 5, 1956

The Court: Cause No. 12,798, United States of America versus Veto Giordenello. What says the Government?

Mr. Dowd: The Government is ready, Your Honor. However, I would like to bring one matter up outside the panel. May we have the jury panel removed? Do you want the defendant here?

The Court: We had better have the defendant here.

All right, what is the matter?

MOTION THAT COUNT TWO OF INDICTMENT BE DISMISSED AND DISMISSAL THEREOF

Mr. Dowd: The Government would like to move and recommend that Count 2 be dismissed.

The Court: Count 2?

Mr. Dowd: Yes, sir.

The Court: Any objection?

Mr. Scott: In view of that announcement, Judge, we would waive a jury and like to be tried before the Court.

The Court: On Count 1?

Mr. Scott: Yes, sir. It is really a matter of protecting ourselves on that motion, and I think we could do it before the Court.

The Court: On Count 2, on the recommendation of the [fol. 55] district attorney, with the consent of the defendant and his counsel, Count 2 is dismissed. Is that agreeable with you, Mr. Giordennello?

Mr. Giordenello: Yes, sir.

Mr. Dowd: I would like to make the statement here that I have not discussed this at all with defendant's attorneys, this recommendation.

The Court: I am not interested. It is agreeable whether you have or have not discussed it with them. There is no question of a trade, is that what you mean?

Mr. Dowd: Yes, sir.

Mr. Scott: Yes, sir. Do you wish to accept the waiver of jury?

The Court: You have a copy of the waiver?

Mr. Scott: Yes, sir.

The Court: Do you have a waiver prepared?

Mr. Dowd: Yes, Your Honor.

The Court: Count 2 is dismissed.

Mr. Scott: I am just protecting my motion I made the other day.

The Court: That's an entirely different matter. You have preserved your record on that.

Mr. Scott: Yes, sir. But I couldn't waive it by admitting evidence now that would overcome it.

[fol. 56] The Court: You mean beginning trial without prejudice to your motion?

Mr. Scott: Yes, sir.

The Court: Well, you gave this morning notice of dissatisfaction and took exception to the ruling of the Court when that was announced. That is in the record likewise.

Mr. Scott: Yes, sir.

The Court: Both sides having announced ready for trial on Count 1, which is the only count left, we will proceed.

(Following signing of a waiver of jury, Mr. Dowd read Count 1 of the indictment.)

PLEA

The Court: To which the defendant as to Count 1 enters a plea of ——

Mr. Scott: Not guilty.

The Court: Not guilty. All right.

All witnesses in the Giordenello case will please stand, raise your right hand and be sworn.

The rule?

Mr. Scott: He is pleading not guilty without waiving the motion heretofore filed and the exception taken to the Court's ruling.

The Court: That's right.

Was the rule invoked or not?

[fol. 57] Mr. Scott: No, sir.

The Court: Call your first witness.

WILLIAM THOMAS FINLEY, a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Q. (By Mr. Dowd) Will you state your name and occupation, please?

A. William Thomas Finley, enforcement agent for the Federal Bureau of Narcotics, U. S. Treasury.

Q. Where are you stationed, Mr. Finley?

A. Houston, Texas.

Q. Where do you live, sir?

A. In Houston, Texas.

Q. How long have you been with the Federal Narcotics Service?

A. Over four years, sir.

Q. Mr. Finley, do you know the defendant in this case, Veto Giordenello?

A. I do.

Q. Did you have occasion to see him on January 27, 1956?

A. I did.

Q. Would you relate to the Court, please, sir, the facts about your seeing him on that day?

[fol. 58] A. On January 26th—27th, rather, 1956, at about 5:30 p.m., I began to maintain surveillance over the residence of Veto Giordenello at 2901 Airline Drive, Houston, Texas.

At about 5:45 Veto Giordenello, driving his 1955 Cadillac, appeared at his home, drove into his home.

At about 7:15 p.m. Veto Giordenello came out of 2901 Airline Drive, Houston, Texas, and got into his 1955 Cadillac and proceeded to leave the area. My surveillance was maintained and I followed him to the intersection of Lathrop and Brownsville Streets, Houston, Texas, where I observed he parked his car, a '55 Cadillac——

The Court: If it isn't the same Cadillac—I have understood your three statements it was a 1955 Cadillac.

The Witness: The same automobile.

And got out of the car and entered 6827 Brownsville Street, Houston, Texas.

And he was in that house for approximately thirty minutes. I observed him to come out of the house, the rear entrance of this house, and to enter a garage, a one-car garage which was located to the rear of the property and of this house at 6827 Brownsville Street, Houston, Texas.

[fol. 59] Less than sixty seconds later he came out of the garage, before-described garage, and as he approached the area of the gateway in the fence that surrounds that property I placed him under arrest.

And in his possession——

Mr. Scott: If the Court please, we want to make the objections in our motion that any evidence he found at this time—as set out in our motion—that the warrant for arrest was based upon a complaint that was unfounded, and he did not have a search warrant at the time that he placed him under the alleged arrest.

In other words, I am just making my objection to protect the motion, if the Court please.

The Court: Go ahead.

Q. (By Mr. Dowd) Mr. Finley, at what time, approximately, was it when you placed the defendant here under arrest?

A. Approximately 8:00 p.m. on January 27, 1956.

Q. And exactly where did you place him under arrest? At what location?

A. On the property of 6827 Brownsville Street, Houston, Texas.

Q. Could you identify the defendant, please?

A. Veto Giordenello is the man in the dark brown suit [fol. 60] just to the rear of Attorney Woody.

Q. Now, at the time you started surveilling him or some house at 2901 Airline Road, Houston, Texas, were you alone?

A. I was not.

Q. Were you on duty at that time?

A. I was.

Q. Who was with you?

A. I was in the company of George D. Shelton, narcotic officer, Houston Police Department, Narcotics Division.

Q. And was *with* Mr. Shelton with you during the entire time you surveilled the house at 2901 Airline Road up until the time of the arrest?

A. Yes, he was.

Q. Now, Mr. Finley, when the defendant Giordenello went into the house at 6827 Brownsville Street, Houston, Texas, you say you watched there or observed for about thirty minutes, is that right?

A. Yes.

Q. Where were you located when you were observing?

A. Just across the street on Lathrop Street, on the doorstep, front doorstep of a grocery store which is lo-

cated on the corner of Brownsville and Lathrop just opposite 6827.

[fol. 61] (Thereupon two objects were marked for identification as Government's Exhibits 1-A and 1-B.)

Q. (By Mr. Dowd) Mr. Finley, I direct you attention to what has been marked as Government Exhibit 1-A, and ask you, sir, if that is a locked sealed envelope?

A. Yes, sir.

Q. And is it locked, sir?

A. It is.

Q. Will you please open that and examine it and tell us what you find?

A. Do you have a knife?

Q. Would you describe the contents of Exhibit 1-A?

A. There is a brown manila bag or sack and approximately six ounces of a substance, which I have initialed.

Q. When was the first time you saw this particular sack and the substance therein?

A. About 8:00 p.m. on January 27, 1956.

Q. And where did you first see it?

A. In the hands of Veto Giordenello.

Q. And where was he coming from when you saw that in his hand?

A. From the garage entrance to the rear of 6827 Brownsville Street, Houston, Texas.

Q. Now, would you look in the sack and tell me what, to the best of your recollection and knowledge, is in there?

[fol. 62] A. There are ninety-five bindles or papers which are approximately ten grains each of a substance wrapped in a Cellophane—each wrapped in a Cellophane individual wrapper, and a brown manila envelope which also contains a quantity of the substance.

Q. Now, how do you identify, Mr. Finley, the sack and the contents?

A. By my initials on each one of the bindles or papers in the brown manila envelope and brown paper sack.

Q. Describe specifically exactly what you saw from the first time you saw the defendant with that sack in his hand until you took it from him.

A. I saw this sack, brown paper sack, in the defendant's left hand, and inside were the contents that were

presently there, this brown manila envelope and the ninety-five papers or bindles.

Q. Where was he coming from when you took the sack from him?

A. He was coming from the entrance of the—passage entrance of the garage which is located to the rear of the property at 6827 Brownsville Street, Houston, Texas.

Q. And what was he doing at the time you took the sack [fol. 63] from him?

A. He was standing within two feet or just within the gate area of the property.

Q. Did you notice any particular type of license plate on the Cadillac automobile?

A. A 1956 Illinois license plate 379-137, I believe.

Q. Now, at the time you took this sack and the contents, was it in the same form it is now in your hands, sir?

A. Yes, sir, it is, or was.

Q. Do you find any federal tax stamps which are required by law on any of those contents now?

A. There were none found.

Q. Nor at that time?

A. None at that time.

Q. And this is now in the same condition as the time you took it?

A. It is.

Mr. Scott: Judge, without renewing my objection to each question, I object to what was found by virtue of the search, the fact that they had no search warrant. It is my understanding that my objection and exception goes to this.

The Court: It can be taken along with the case.

Mr. Scott: Yes, sir. I didn't want to be renewing it as [fol. 64] to each question. Something might slip in to ruin my motion.

The Court: All right. Any time you care to you make your objection.

Mr. Scott: Does it go to all of what he found by virtue of the arrest and search? I didn't want to renew it as to each question.

The Court: Either way. It can go to the entire testimony of this witness or the witness Shelton.

Mr. Scott: Yes, sir.

Q. (By Mr. Dowd) Mr. Finley, what did you do with this Exhibit 1-A when you received it, sir?

A. At the time of seizure, at the time it was taken away from the defendant Veto Giordenello, Officer Shelton took it into custody and maintained custody over it until in my presence he had initialled each of the ninety-five bindles or papers and all of the contents in the paper sack.

He then turned it over to me and in my custody I initialed it, weight and sealed the envelope, and placed it in a locked sealed envelope and sent it to the United States Chemist. at Dallas, Texas, by registered mail.

Q. I direct your attention to an exhibit marked 1-B, and ask you if you recognize that, sir?

[fol. 65] A. I do.

Q. What is that?

A. This is the original locked sealed envelope in which the evidence was sent to the United States Chemist at Dallas, Texas, by registered mail.

Q. Did you have a warrant for the arrest of the defendant at the time you arrested him, sir, on the 27th day of January, 1956?

A. I did.

Q. At the time of arrest, Mr. Finley, did you identify yourself to the defendant Giordenello?

A. I did.

Q. Did you make any threats or promises to him at that time?

A. I did not.

Q. After having so identified yourself and not having made any threats or promises, did you have any conversation with him?

A. I did.

Q. Would you relate the substance of those conversations?

A. I warned him of his constitutional right under the Fifth Amendment, told him he did not have to say anything to me, but anything he said would be held against me — against him. Excuse me.

[fol. 66] At that time he stated that he had received the heroin in Chicago, that it had been one ounce of pure heroin, that he had adulterated it, cut it into the present condition, six ounces, and brought it to Houston.. That the connection

in New York was one Benny on the lower East Side, and this Benny ran a restaurant on the lower East Side of Manhattan, and he stashed his narcotics, kept his narcotics with a colored woman who could pass for white in upper Manhattan.

Further that Benny's connection was in New Jersey, and this Benny delivered—had delivered anywhere from twenty to forty ounces of pure heroin a week from New York-New Jersey to Chicago.

Q. Now, in order that we are clear, you have referred to heroin generally and specifically. Were there any conversations, or what part of the conversation that you just related refers to Exhibit 1-A about being——

A. All of it.

Q. All of it?

A. Yes, sir.

Q. He did admit that it was his?

A. He did. I asked him if any of it had gotten away or if we had missed any of it, any of the heroin that he had, and he said no, we had gotten it all.

[fol. 67] Q. Would you read the registry number on Exhibit 1-B, please, sir?

A. It is marked 13683, 13684, I believe.

Q. And you did inspect the contents of 1-A at the time of arrest and found no federally required tax stamps on any of the packages?

A. No, sir, I did not. I inspected it but did not find them.

Mr. Dowd: At this time, Your Honor, I would like to offer in evidence Exhibits 1-A and B. Exhibit 1-A we will prove the contents two witnesses from now.

Mr. Scott: Of course, our objection is this was obtained from the defendant without a warrant, on a purported warrant of arrest not based upon a legal complaint, and there was no search warrant issued in this case.

The Court: Objection overruled. Admitted in evidence.

(Thereupon an instrument was marked for identification as Government's Exhibit No. 2, being the same instrument heretofore marked as Defendant's Exhibit No. 2.)

Q. (By Mr. Dowd) Mr. Finley, I direct your attention to Government's Exhibit 2, which is a warrant of arrest, and

[fol. 68] ask you, sir, is that the warrant that you had on the night that you arrested the defendant in this case?

A. I am not able to identify that as the particular one, no. My name does not appear on it and there are no markings on it. That appears to be the same warrant that was issued by Mr. Costa.

Q. What date was it issued, sir?

A. January 26, 1956.

Mr. Scott: We are going to object to it because the witness says he can't identify it as the warrant.

The Court: Has it been offered?

Mr. Dowd: No, sir, it has not.

Mr. Scott: I thought it had. Excuse me.

Mr. Dowd: At this time I would like to ask the Court to take judicial notice of the file that is in the Clerk's office, that the defendant in this case was arrested on a complaint and warrant. I believe the records are in Mr. Costa's file.

Mr. Scott: We will object to that. The warrant referred to does not show it was executed by this office but by the United States Marshal. And it would be attempting by parol evidence to alter a written instrument on file with the Clerk of the court.

[fol. 69] The Court: I will let it in subject to your objection.

Mr. Scott: Note our exception.

Would Your Honor like to inspect it? I was referring to something without showing it to the Court.

(Thereupon an instrument was marked for identification as Government's Exhibit No. 3, being the same instrument heretofore marked as Defendant's Exhibit No. 3.)

Mr. Scott: May it please the Court, the further objection that since the affidavit was executed before the Commissioner and since the warrant was executed they have been altered and the name changed and it is not such a change that comes within the doctrine of idem sonans.

The Court: Overruled.

Mr. Scott: Note our exception.

Q. (By Mr. Dowd) Mr. Finley, I direct your attention to Exhibit 3, a standard form of complaint, and ask you if your signature appears on there?

A. It does.

Q. And does any other signature appear?

A. Yes, sir.

Q. Whose is that?

[fol. 70] A. William H. Costa, United States Commissioner.

Q. What does that instrument represent to you?

A. The complaint filed before Mr. Costa by myself against Veto Giordenello.

Q. What is the date of that?

A. January 26th, 1956.

Q. And Exhibit 2 is a warrant issued on the same date, sir?

A. Yes, it is.

Q. Were you given a warrant, physically have a warrant in your possession to arrest this defendant?

A. Yes, sir, I did.

Q. Do you recall the date of that warrant?

A. January 26th, 1956.

Q. Did you ever have any other warrant in your life dated January 26th, 1956, for the arrest of Giordenello, the defendant here?

A. No, sir. I never have.

Mr. Dowd: The Government offers in evidence, Your Honor, Exhibits 2 and 3, the complaint and warrant.

Mr. Scott: One question would be easy to answer if the Court would permit me a question on voir dire?

The Court: Certainly.

[fol. 71] Voir dire examination.

Q. (By Mr. Scott) Mr. Finley, at the time you say a warrant was handed you by the Commissioner, a warrant of arrest?

A. Yes.

Q. Could you look at this warrant and tell me what name appeared on the warrant you had that was given you by the Commissioner?

A. The name pertaining to what particular person? William H. Costa?

Q. No, sir, tell us the two names of the defendant.

A. United States versus Veto Giordenello.

Q. Yes, sir.

A. Veto Giordenello.

Q. What was the name on the warrant you had?

A. Veto Giordenello.

Q. Well, do you see two names there?

A. I see two spellings of one name, one of which is crossed out.

Q. Will you spell it?

A. V-E-T-O G-I-O-R-D-E-N-E-L-L-O and V-I-T-O G-I-O-D-A-N-I-L-L-O.

Q. Which one of those names appeared on the warrant when you received it?

Mr. Dowd: Your Honor, I object to this. I believe the [fol. 72] instrument speaks for itself.

The Court: Overruled.

The Witness: At the time of the issuance of the warrant I believe I can recollect the name V-I-T-O G-I-O-D-A-N-I-L-L-O.

Q. (By Mr. Scott) That name is scratched out in the warrant, Government's Exhibit 2?

A. Yes.

Q. And another name inserted above it?

A. Yes, sir. Same name, different spelling.

Q. One is V-I-T-O and the other is V-E-T-O?

A. The one crossed out is V-I-T-O.

Q. And G-I-O-D-A-N-I-L-L-O?

A. Giodanillo.

Q. Is there any "R" in that name?

A. Which name is that?

Q. The one scratched out. You wouldn't pronounce it Giordenello.

Mr. Dowd: I object to all this.

Q. (By Mr. Scott) Is it a name you can pronounce?

A. Giodanillo, yes, sir.

Q. Do you remember when the other name was inserted in the warrant?

A. I can recollect, I believe, sir, that Veto Giordenello, Mr. Costa asked Mr. Giordenello the proper spelling of [fol. 73] his name, and at that time I believe I was sitting there and witnessed the initialing by Giordenello of the correction in the spelling of his name, yes, sir.

Q. In number 3 it is also changed?

A. Yes, sir, it is.

Q. And both of those changes were made after the papers had been issued and had been—the warrant had been placed in your hands?

A. Yes, sir.

Q. Was it about the 28th?

A. These changes were made upon the return to Mr. Costa, the physical return of the warrant.

Mr. Scott: Now we want to object first because the affidavit has been changed, and to change an affidavit without reswearing to it would destroy the effect of it, and they are not idem sonans.

The Court: Overruled.

Direct examination, continued.

Q. (By Mr. Dowd) Mr. Finley, when you took out the complaint, Government's Exhibit No. 3, regardless of the spelling of the name, did you have in mind the person against whom that complaint was issued?

A. I had in mind the name of the person to whom—the defendant here, and the spelling here is——

[fol. 74] Q. Setting the spelling aside for a moment. Did you know against whom you were taking out that complaint at the time you took it out?

A. Against the defendant.

Q. And is it the same defendant Giordenello that is in this court room today?

A. It most certainly is.

Q. And Exhibit 2, the warrant of arrest, at the time you executed such a warrant, regardless of the spelling, did you have in mind the person that you had taken the complaint out against?

A. I did.

Mr. Scott: We want to object because the warrant of arrest shows it was executed by another officer and not by this officer.

The Court: Overruled.

Q. (By Mr. Dowd) You had in mind that this warrant was the person that you had taken the complaint out against in Exhibit 3?

A. That's correct, I did.
Q. Regardless of the spelling?
A. Yes.
Q. Typographical errors, or minor details like that.
A. Yes, sir.

Mr. Scott: May it please the Court, that is leading and [fol. 75] suggestive.
The Court: Don't lead the witness.
Mr. Scott: I move that that be stricken.
The Court: That's right. "Typographical errors or minor defects."
Mr. Dowd: Pass the witness.

Cross examination.

Q. (By Mr. Scott) Mr. Finley, was this name on the Government's Exhibit No. 2, which is the warrant of arrest, changed before or after the United States Marshal made his return of this warrant, if you know?

Mr. Dowd: If the Court please, I believe he is calling for a conclusion that the marshal made the return.
Mr. Scott: It speaks for itself, Your Honor. It's a written instrument.
The Court: Just ask when it was made.

Q. (By Mr. Scott) Tell me when the change was made as to the name in the Government's Exhibit No. 2.
A: The ——

Mr. Dowd: May I take the witness on voir dire for about two questions, Your Honor?
The Court: All right.
Mr. Dowd: Mr. Finley, did you make the change?
The Witness: No, sir, I did not.
[fol. 76] Mr. Dowd: I object to this witness testifying as to when the change was made. I believe the person who made it is the best evidence.
The Court: If he was present and saw it made I will let him answer.

Cross examination, continued.

Q. (By Mr. Scott) Were you present, and did you see it made?

A. I was present and heard some conversation as to the change. I can't testify I physically saw the change made, no.

Q. When was that? What time of day and what date?

A. That was during the waiting of the hearing of Veto Giordenello and his attorney in the office of Mr. —— the United States Commissioner, Mr. Costa. I believe that was on the 28th of January, '56.

Q. Twenty-eighth day of January?

A. I believe in the early afternoon or late morning.

Q. I hand you here Government's Exhibit 3, complaint for violation of United States Code, Title 21, Section 174, and ask you if that is the original instrument you executed?

A. This is the complaint, the original complaint.

Q. Yes, sir.

A. Yes, sir.

[fol. 77] Q. Made by you, Mr. Finley?

A. The complaint was made by me, yes, sir.

Q. This is dated the 26th day of January, 1956?

A. It is, yes, sir.

Q. Within three years prior to January 26th, 1956, Mr. Finley, of your own knowledge, did you see Veto Giordenello receive, conceal, any narcotic drugs?

A. Excuse me. Within three years prior?

Q. Yes. Limitation on this is five years. I want to get the period of limitation.

Mr. Dowd: I object to this. I don't see the relevancy in this, in that is has already been gone over in the previous motion, going to the validity of the complaint.

The Court: We devoted a whole lot of time to the motion, which was overruled after a hearing.

Mr. Scott: May we consider the testimony in the motion introduced at this time? On re-introduction?

The Court: It is a separate transaction, and will be part of the transcript, if there is a transcript.

Mr. Scott: Yes, sir.

The Court: We can go forward on the facts. That is the matter we heard last Friday.

Mr. Scott: No further questions, Your Honor.

[fol. 78] The Court: Is that all?

Mr. Dowd: Yes, sir. Thank you.

The Court: Call your next witness.

GEORGE D. SHELTON, a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Q. (By Mr. Dowd) State your name and occupation, please.

A. George D. Shelton, narcotics officer, City of Houston Police Department.

Q. Where do you live, Mr. Shelton?

A. Houston, Texas.

Q. How long have you been with the narcotics division of the Houston Police Department?

A. About a year.

Q. And how long have you been employed by the Houston Police Department?

A. Over three years.

Q. Mr. Shelton, did you have an opportunity to see the defendant Veto Giordenello on the 27th day of January, 1956?

A. Yes, sir, I did.

Q. Where did you first see him on that date?

A. 2901 Airline Drive.

[fol. 79] Q. And who were you with when you observed the defendant at that address?

A. Agent Finley of the Federal Narcotic Bureau.

Q. At Airline Drive, Houston, Texas?

A. Yes, sir.

Q. All right. Would you tell the Court what you observed when you first saw the defendant on Airline Drive?

A. The first time I saw the defendant on Airline Drive——

Q. On the 27th of January, 1956.

A. Yes, sir. It was approximately 5:30, 5:45 p.m., at which time we kept him under surveillance until later when he came out of his house, got into his car, and we followed him to 6827 Brownsville Street,

Q. Houston, Texas?

A. Houston, Texas.

At which time Agent Finley and myself were sitting on the steps of the grocery store directly across the street from 6827 Brownsville Street, and from which we watched the defendant Veto Giordenello approximately thirty min-

utes, when he came out of the house and went into a garage, one-car garage, in the rear of the house at 6827 Brownsville.

Q. And after he went into the garage what did you see [fol. 80] next?

A. In a very few seconds he came out of the garage, at which time Agent Finley and myself walked across the street, walked up to the defendant, at which time he was carrying a small brown envelope.

Q. I show you what has been marked as Government's Exhibit 1-A, and ask you if you have seen that before?

A. Yes, sir.

Q. What is it?

A. This is the brown paper sack which the defendant had in his left hand.

Mr. Scott: We are going to object to what he found or he had in his hand because it was not by virtue of a search warrant or a warrant of arrest based upon a valid complaint.

The Court: Overruled.

Mr. Scott: And to all of his testimony so it will run through, so I won't be bothering the Court with a continual objection.

The Court: Yes, sir. As to the invalidity of the search.

Mr. Scott: Yes, sir.

Q. (By Mr. Dowd) How do you identify that sack?

A. This is the sack on which I placed the defendant, the address, the date and my initials.

[fol. 81] Q. Would you look in the sack, Mr. Shelton, and tell us what you find in there?

A. This is the small brown sack which was in the large paper sack at the time which we confiscated it from the defendant.

Q. Anything else?

A. Yes. The papers or bindles, at which time ninety-five was in this sack. There was also put on by me the date and my initials on each.

Q. Where was the defendant at the time you took this sack from him?

A. He was just inside the gate of the yard at 6827 Brownsville.

Q. And where was his automobile?
A. It was parked just across the ditch.
Q. What type of car was it?
A. It was a 1955 Cadillac Coupe de Ville.
Q. Do you recall what type of license plate it had on it?
A. It had 1956 Illinois license plates.
Q. Who took the sack from the defendant's hand?
A. I took it from his left hand.
Q. And what did you do with the sack after you took it from the defendant?
A. I kept it in my possession until we got to the narcotic [fol. 82] office at the Houston Police Department.
Q. What——
A. At which time I placed my initials on the papers and the small brown envelope and brown paper sack and then I turned it over to Agent Finley.
Q. That is Agent Finley who just previously testified in this trial?
A. Yes, sir.
Q. And that was all done on the same date? The same evening of the 28th of January, 1956?
A. Yes, sir.
Q. Did you see any tax stamps, federal tax stamps on any of the papers in the Exhibit 1-A?
A. No, I did not.
Q. And you find Exhibit 1-A to be in the same condition it was on the occasion you took it from the defendant?
A. Yes, sir.
Q. After looking at it here in the court room?
A. Yes, sir.
Q. Was there anything on it in the way of original packages or tax stamps?
A. No, sir, there wasn't?
Q. At the time the arrest was made on Brownsville Street in Houston did you hear any threats or promises made to [fol. 83] the defendant Giordenello?
A. No, sir, I did not.
Q. Did you have any conversations with him at the time of the arrest?
A. Yes, sir.
Q. Did you identify yourself to him?
A. Yes, sir.

Q. How did you identify yourself to him, Mr. Shelton?

A. Agent Finley showed the defendant his identification and told him who he was, and at that time I told the defendant Veto Giordenello I was a city narcotics officer working with Agent Finley and the Federal Bureau of Narcotics.

Q. Now, did you have any conversations with the defendant Giordenello at the time of his arrest?

A. Yes, sir.

Mr. Scott: If the Court please, I think our objection went to the testimony, the conversation—I want to be sure it goes to this as well.

The Court: Overruled.

Q. (By Mr. Dowd) What conversation, in substance, do you recall?

A. At first when I took the sack out of Veto's hand I asked him what was in it. He said washing machine parts. At which time I placed handcuffs on him, opened the sack [fol. 84] and looked inside, which I noticed the papers and the large container which I believed to be heroin.

Q. Did you have any discussions as to who owned the substance in the Exhibit 1-A?

A. Yes, sir.

Q. And what conversations, in substance, did you have?

A. After we placed the defendant in the car we asked him if the subject at that address had any dealings with the heroin. He said no, he did not know anything about it. It was his, and the man that lived there did not know anything about it.

Q. He was referring to the person who lived at this Brownsville Street address?

A. Yes.

Q. And he said it was his heroin?

A. Yes.

Q. At the time you observed the defendant out on Airline Drive, I believe you testified he started to drive and then you all followed him, is that right?

A. Yes.

Q. To the Brownsville Street address?

A. Yes.

Q. Did you notice anything else out around there at that time, during this period of surveillance, while you were watching?

[fol. 85] A. Yes, sir.

Q. Tell us what you observed.

A. At the time Giordenello came out of his residence on Airline onto Airline Drive, there was another subject who I recognized as being a well-known police character——

Mr. Scott: We are going to object to this as prejudicial and showing that he was there or some well-known police character was there, unless it is shown whether it is material. It is immaterial and irrelevant.

The Court: I will let him state it, subject to your motion to strike if it isn't material.

Go ahead.

The Witness: Which the other subject was recognized by me, which was following Giordenello——

The Court: When did he come into the picture? After you had arrested him?

The Witness: No sir. Just as the defendant pulled out of his drive into Airline the other subject was at his house, got into his car and was pulling out behind the defendant, was following bumper to bumper.

The Court: From Airline over to Brownsville?

The Witness: Yes, sir.

Q. (By Mr. Dowd) What type of automobile was this [fol. 86] subject—this other individual in?

A. It was an old model black Chevrolet.

Q. Did he come out of the same house the defendant came out of on Airline Drive?

A. Yes, sir.

Q. They each got into separate cars?

A. Yes, sir.

Now, when Giordenello got over to the Brownsville Street address, he parked his car, is that correct?

A. Yes, sir.

Q. What did you observe, if anything, about this other person driving his car?

A. The other subject—at first, before the defendant went into the Brownsville address he and the other subject stopped side by side one block north of Brownsville on Lathrop, at which time they stood there for approximately two or three minutes talking with the defendant out of his car over to the other subject's car. The defendant turned right,

which would be south on Lathrop down one block to 6827 Brownsville, at which time the other subject turned to his left on Lathrop, which would be going north, pulled down one block, and parked beside a little beer joint on the corner and set in his car. At which time Agent Finley and myself [fol. 87] went up to Lathrop and Brownsville, parked out car around the corner and set on the steps of this grocery store.

Mr. Dowd: Pass the witness.

Mr. Scott: If the Court please, I move that this last testimony be stricken because it isn't shown there was any law violated whatsoever. It is irrelevant and immaterial and burdensome to the record.

The Court: Overruled.

Mr. Scott: No questions, Your Honor.

Kenneth B. Anderson, Jr., a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Mr. Scott: Judge, for the record we would admit Mr. Anderson's qualifications and his job.

The Court: All right. A Government chemist.

Q. (By Mr. Dowd) State your name and occupation, please.

A. Kenneth B. Anderson, Jr. I am a chemist for the Alcohol and Tobacco Tax Division, U. S. Treasury Department.

Q. Mr. Anderson, I will show you Exhibit 1-A and ask you, sir, if you will look at the contents and tell us what that is.

[fol. 88] A. It contains a bag that I have initialed with my initials K. V. A. and the numbers. I identified this brown envelope with the laboratory number 13683, and I identify my initials on these packets, and it contains——

Mr. Scott: If the Court please, we are going to object to this testimony of Mr. Anderson for the reason that the exhibit shown to him was obtained by the officer who placed

it in his possession without a search warrant and without a valid warrant of arrest.

The Court: Objection overruled.

The Witness: It contains in the brown envelope 1395 grains of heroin hydrochloride, 15.5 per cent anhydrous heroin; and in the ninety-five packets contains a total of 1211 grains of heroin hydrochloride, 15.1 anhydrous heroin.

Q. (By Mr. Dowd) You examined that personally yourself, sir?

A. Yes; I did.

Q. You ran a number of the usual checks on it?

A. Yes.

Q. Approximately how many ounces is there?

A. Well, the bulk is approximately 3.2 ounces, and the ninety-five packets are approximately 2.8 ounces, making a total of 6 ounces, approximately, or 2606 grains.

[fol. 89] Q. How did you receive the Exhibit 1-A, Mr. Anderson?

A. 1-A was received in this envelope which is marked Government's Exhibit 1-B by registered mail, and received January 31, 1956, and it was received in this locked envelope, sealed. I opened it and analyzed it and replaced it in Government's Exhibit 1-A.

Q. And you kept Government's Exhibit 1-A in your possession from receipt until when?

A. Yes. It was placed in our vault in Dallas, and I brought it into court with me and turned it over to you.

Q. Today?

A. Yes, sir.

Q. What is the registry number under which you received it? Under which you received 1-A, sir?

A. Received by registry number 8388.

Mr. Dowd: Pass the witness, Your Honor.

Cross-examination.

Q. (By Mr. Scott) Mr. Anderson, you kept a record of this package? You keep a record of packages and its contents that have been received and identified?

A. Yes, sir. We have a record.

Q. Now, when you weighed it, did you weigh it paper and all?

A. No, sir. I removed the contents.

[fol. 90] Q. Out of each?

A. Yes.

Q. Out of each one of the little papers?

A. Yes.

Q How much heroin was there and how much milk sugar or foreign substance?

A. I think the analysis of one was fifteen and a half per cent—I don't remember which way it was. The papers, I think, were 15.1 per cent heroin.

Q. Fifteen per cent of the 6 ounces?

A. Yes, sir, a little less than an ounce of pure heroin.

Q. Just a little less than an ounce of heroin?

A. Yes.

Q. And the other was a non-prohibitive substance?

A. Yes, as far as I know.

Mr. Dowd: If he is referring to a legal non-prohibitive substance I object to it as calling for a conclusion which this witness is not qualified to answer.

The Court: At any rate, it wasn't heroin?

The Witness: No, sir. Some substance other than heroin.

Q. (By Mr. Scott) At any rate, you did not analyze it?

[fol. 91] A. No, sir, we don't do that.

Q. So it would be about 15 per cent of 6 ounces. That would be less than one ounce, wouldn't it?

A. Yes, sir. About nine-tenths of an ounce, approximately.

Mr. Scott: About nine-tenths of an ounce. Thank you, Mr. Anderson. That's all.

The Court: Both through?

Mr. Dowd: Yes, sir. Thank you very much, Mr. Anderson.

The Government rests, Your Honor.

The Court: The Government rests. What says the defendant?

Motion for Directed Verdict and Denial Thereof

Mr. Scott: The Government rests, and we will rest too and move the Court to direct a verdict of not guilty for the reason that no search warrant, no valid warrant of

arrest based upon a valid complaint, and there is no testimony by the tax collector or a person authorized to issue tax stamps or to license people they have not issued a license to the defendant.

The Court: Overruled.

Mr. Dowd: The Government would like—shall we say a word, Your Honor?

The Court: I have ruled on the motion. Would there be any further testimony?

[fol. 92] Mr. Dowd: No, sir.

The Court: How much time do you want to argue?

Mr. Dowd: A very short time, Your Honor, for me.

Mr. Scott: I think the Court understands my position without argument.

The Court: That's right. Your sole defense is lack of legal search.

Mr. Scott: Yes, sir.

Mr. Dowd: In view of that, just a few minutes for me.

The Court: Go ahead.

(Short argument.)

The Court: No further argument?

Mr. Scott: I think the Court understands my position. I am protecting my record.

VERDICT

The Court: On Count 1 the Court finds the defendant guilty as charged. Count 2 has been heretofore dismissed, of course.

Presentence by Friday of this week.

Committed.

The Clerk: Can the Government chemist withdraw this?

Mr. Scott: Yes, he sure can.

The Court: Is it all right for the Government chemist to have the exhibits?

[fol. 93] Mr. Scott: Yes, sir, perfectly agreeable with me.

[fol. 94] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings—May 11, 1956

I, Howard J. Boland, deputy official shorthand reporter for the United States District Court for the Southern District of Texas, hereby certify that the following is a true and complete transcript of the proceedings had before His Honor, Allen B. Hannay, Judge of said Court, on the 11th day of May, 1956. Witness my official hand this 28th day of May, 1956.

Howard J. Boland, Substitute Official Reporter, United States District Court, Southern District of Texas.

[fol. 95] APPEARANCES:

C. Anthony Friloux, Esq., Assistant United States Attorney, Houston, Texas, For the Government.

Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

COLLOQUY BETWEEN COURT AND DEFENDANT

The Court: Mr. Giordenello, one of your attorneys, Mr. Woody, and your bondsman in one or two cases, Mr. Morello, have told me that Mr. Morello wanted to get off two of your bonds, one for $30,000 and one for $40,000. One was the appeal bond and the other was on the two or three count one in the second case. He wanted to get off the bond in the amounts of thirty and forty thousand dollars respectively, thirty thousand appeal bond, and I didn't know whether that was satisfactory with you or not.

I didn't know whether you had paid this bondsman some money and you didn't want him to get off your bond. He didn't give any reason why he wanted to, and I thought [fol. 96] it was the right thing for you to be given the opportunity to tell me whether or not it was agreeable with you.

Mr. Giordenello: Yes, sir.

The Court: To let him go off the bond in both instances?

Mr. Giordenello: Yes, sir.

The Court: You understand that?

Mr. Giordenello: Yes, sir.

The Court: If you have any complaint as to his wanting to go off, any reason why he shouldn't, if you have paid him a substantial sum of money or anything of that nature and you don't want him to, I will certainly listen to whatever you have to say in that regard.

Mr. Giordenello: No, sir, I didn't pay him anything, so it's perfectly all right with me.

The Court: In both instances?

Mr. Giordenello: Yes.

The Court: Both bonds?

Mr. Giordenello: Yes, sir.

The Court: Then I will permit him to go off both of the bonds that he is on now, and surrender you to the marshal, which is, I believe, already the fact.

[fol. 97] IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT AND SENTENCE—Entered March 9, 1956

On this 9th day of March, 1956, came the attorney for the United States of America, and the defendant, Veto Giordenello, appeared in person and with counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and in accordance with the findings of the Court rendered in this cause on the 5th day of March, 1956, of the offense of unlawfully purchasing narcotics, in violation of Section 4704, Title 26, U. S. Code, as charged in Count 1 of the Indictment; and of a previous conviction for violation of the narcotic laws, the defendant having affirmed in open court that he is identical with the person previously convicted; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the defendant having been afforded an opportunity to make a statement in his own behalf and present any information in mitigation of punishment;

It is adjudged that the defendant is guilty as charged and convicted on Count 1; Count 2 having been dismissed by the Court on motion of the Government.

[fol. 98] It is the sentence of the court that the defendant be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) Years; and that he pay a fine of Twenty-five ($25.00) Dollars on Count One.

It is ordered that the United States of America recover from the defendant the sum of $25.00, named above, for which execution may issue. In default of the payment of said fine, the defendant is to be committed until the fine is paid or until he shall be discharged under Sec. 3569, Title 18, U. S. Code, or otherwise lawfully discharged.

It is further ordered that the Clerk deliver a certified copy of this judgment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein.

(S.) Allen B. Hannay, Judge.

Approved by: (Initials illegible.)

The Court recommends commitment to: Texarkana, Texas.

[fol. 99] In United States District Court

Motion for New Trial—Filed March 9, 1956

To the Honorable Judge of the Court Aforesaid:

Now into Court comes the defendant, Veto Giordenello, in the above styled and numbered cause and respectfully moves the Court to grant him a new trial herein for the following reasons, to wit:

I

That the Court erred in refusing to sustain the Motion to Suppress, filed by this defendant, for the reasons that the complaint made before the United States Commissioner, at Houston, Texas, was not made upon the personal knowledge of the complainant, and is unsupported by other proof and conferred no jurisdiction upon the United States Commissioner to issue a warrant of arrest. That the warrant of arrest so issued by the Commissioner was used as a search warrant in the relation that the defendant was searched at the time that the said warrant was executed and the evi-

dence upon which this defendant was convicted was thus illegally obtained. That the complainant in the complaint was Mr. William Thomas Fendley, a narcotic officer of the United States of America, and was the same and identical person who used the warrant for the purpose of a purported [fol. 100] arrest and search of this defendant and to obtain evidence which was the basis of this prosecution.

II

That the Court erred in permitting evidence to be admitted over the objection of the defendant of the witnesses William Thomas Fendley and George D. Shelton as to the result of an illegal search of the defendant made contemporaneously with the illegal arrest of the defendant upon a purported warrant issued contrary to Rule 3 of the Federal Rules of Criminal Procedure, in that the complaint issued and executed before the U. S. Commissioner in this cause *doe* not contain a written statement of the essential facts constituting the offense charged.

Defendant further says that the purported warrant of arrest was not in compliance with Rule 4 of the Federal Rules of Criminal Procedure and was not executed as provided in subdivisions 3 and 4 of Rule 4 in that the same was not served by the officer William Thomas Fendley at his first seeing the defendant, but was kept until a latter day when the same was served for the purpose of making a search of the person of this defendant, and said officer did not make a return thereof as provided by law.

III

[fol. 101] Defendant further says that the complaint was made on the 26th day of January, 1956, and at the time of the making of said complaint he had violated no laws of the United States of America and no cause existed for the making of the said complaint and no facts existed upon which to base said complaint, that the said complaint was made for the purpose of obtaining a warrant of arrest to be used as a search warrant. Defendant says that no facts existed for the issuance of a search warrant. That the entire procedure is violative of the Constitution of the United States of America, Amendment Four thereof, and deprives this defendant of due process of law to which he is

guaranteed under the Constitution and laws of the United States of America.

IV

This defendant further says that at the time the complaint was sworn to before the United States Commissioner at Houston, Texas, he was guilty of no offense against the laws of the United States of America, and that all of the evidence upon which he was convicted was obtained as the result of the complaint and warrant of arrest of which he has complained and on a date anterior to the execution of the com-
[fol. 102] plaint and the issuance of the warrant of arrest. In this connection defendant says that the officer making the complaint at the time he made the same did not have personal knowledge of the violation of the laws of the United States of America and particularly Title 21, article 174, U. S. C. A. and also knew all of the facts and circumstances with relation thereto in the issuance of the warrant of arrest.

This defendant says that he has not been prosecuted for a violation of Title 21, section 174 which occurred on January 26th, 1956, or prior thereto, and so far as he knows there is none.

Wherefore defendant Veto *Girdenello* prays the Court to grant him a new trial herein for the reasons as set forth herein and to the end that justice may be done, for which he prays an order of the Honorable Court.

(S.) Veto Giordenello, Counsel of defendant.

Duly Sworn to by Veto Giordenello. Jurat omitted in printing.

[fol. 103] In United States District Court

Notice of Appeal.—Filed April 16, 1956.

To the Honorable Judge of the Court Aforesaid:

Now into Court comes the defendant Veto *Girdenello*, who resides at 2901 Airline Drive, Houston, Texas, and hereby gives notice of appeal from the judgment and order of this

Honorable Court to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, La., and says:

I

The names and addresses of his attorneys are as follows:

[fol. 104] Clyde W. Woody, 2501 Crawford Street, Houston, Texas, and William H. Scott, 1312 Commerce Building, Houston 2, Texas.

II

That defendant is charged with the violation of Article 4704, Title 26, U. S. C. A., in that he had in his possession *thereoin*, which was not in the original stamped package and upon which the tax had not been paid.

III

The judgment of the Court was dated March 9th, 1956, and finds the defendant guilty of the above offense, and the sentence was dated March 9th, 1956, and fixed the punishment at eight years in the United States Penal Institution, in the custody of the Attorney General of the U.S., the court recommended the institution at Texarkana, Texas, and a fine of twenty-five Dollars ($25.00).

IV

That this defendant appeals from the judgment and order of this Court pursuant to Rule 37, of the Federal Rules [fol. 105] of Criminal Procedure, to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

Respectfully submitted, (S.) Clyde W. Woody, (S.) William H. Scott, Attorneys for defendant.

[fol. 106] In United States District Court

Bail Bond Pending Appeal—Filed April 23, 1956

Know All Men by These Presents, that we, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United

States of America the sum of Thirty Thousand Dollars ($30,000.00).

Whereas, the United States District Court for the Southern District of Texas, Houston Division, on the 5th day of March, 1956, entered a judgment in the cause styled United States of America vs. Veto Giordenello, being No. 12,798 on the docket of the court aforesaid, wherein the said Veto [fol. 107] Giordenello was sentenced to serve eight years and a fine of twenty-five dollars, to be paid; and the defendant having filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit to reverse the order of judgment and decree.

Now, the condition of the above obligation is such that if the appeal be dismissed or the order, judgment or decree be affirmed, and Veto Giordenello will surrender himself to the United States *Marshall* for the Southern District of Texas, then this recognizance will be null and void, otherwise, to remain in full force and effect.

This bond is signed on this the *18* day of April, 1956, at Houston, Texas.

(S.) Veto Giordenello, Principal, 2901 Airline Dr.
(S.) 29 Joe Morello, Surety. 2515 Grammercy.

Signed and acknowledged before me this the *18th* day of April, 1956, at Houston, Texas.

(S.) Ralph L. Fowler, U. S. Commissioner

[fols. 108-112] Approved: (S.) Ralph L. Fowler, U. S. Commissioner.

[fols. 113-114] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 115] In United States Court of Appeals

Minute Entry of Argument and Submission—
November 14, 1956

(Omitted in Printing)

[fol. 116] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16065

VETO GIORDENELLO, Appellant

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

OPINION—January 31, 1957

Before Rives, Tuttle and Cameron, Circuit Judges

TUTTLE, Circuit Judge: This appeal from the conviction of appellant of the offense of unlawfully purchasing five ounces of heroin, in violation of Section 4704, I.R.C. 1954, 26 U.S.C.A.,[1] presents the single question whether the trial [fol. 117] court erred in admitting in evidence the heroin which was found on his person when he was arrested. The answer to this question in turn hinges on the legality of Giordenello's arrest.

On January 26, 1956, William T. Finley, an enforcement agent for the Bureau of Narcotics, obtained from the United States Commissioner in Houston, Texas, a warrant for the arrest of Giordenello on a complaint sworn to by Finley and asserting that Veto Giordenello did receive, conceal, etc. narcotic drugs, to wit: heroin hydrochloride, with knowledge of unlawful importation, in violation of

[1] "§4704. *Packages*

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the orignal stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose posession the same may be found."

21 U.S.C.A. §174.[2] At 6 P.M. the following day, having seen Giordenello several times meanwhile and having followed him to a residence other than his own, Finley and another agent waited for him to reappear. He did so about half an hour later, coming out of the back of the house, going into a garage, and then emerging and approaching the gate in the fence of the backyard. They identified themselves and put him under arrest, asserting they did so under the above described warrant, and took from him a paper package he was carrying in his hand containing [fol. 118] five ounces of heroin. After being warned of his rights, appellant freely admitted the possession, telling the officers he had obtained the heroin in Chicago and that he had adulterated it and put it into small "bindles" or packets. He was later indicted and tried for purchasing this five ounces of heroin, which of course could not be the offense for which the warrant had been isued.

Before the trial, appellant filed a motion to suppress the evidence of the officers relating to the seizure and admission of the possession as well as the heroin itself. The ground for such motion was that appellant was searched without a search warrant and without probable cause. The court overruled the motion to suppress. The case proceeded to trial before the court without a jury and resulted in a judgment of guilty and sentence of eight years for a second offense.

The real basis of the attack on the admissibility of the

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[2] The complaint is here reproduced:

"Before William H. Costa, Houston, Texas,
The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did Receive, Conceal, Etc., Narcotic Drugs, to wit: Heroin Hydrochloride with Knowledge of Unlawful Importation: In Violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that —— ——, are material witnesses in relation to this charge.

(S.) Wm. Thomas Finley, Narcotic Agent."

evidence is appellant's contention that the seizure was made without a search warrant (which is, of course, undisputed) and that it was not permissible as incidental to an arrest under *United States v. Rabinowitz,* 339 U.S. 56, and earlier cases, because the arrest was illegal. This was so, appellant says, because the arrest either was not made under the warrant issued on January 26th, or if it was, then the warrant was void.

Taking these latter two points in reverse order, we shall consider first the contention that the warrant was void when the arrest was made. Appellant contends that a warrant [fol. 119] can be issued by the United States Commissioner, or judge, only upon a complaint sworn to by the prosecuting witness, stating the essential facts constituting the offense charged;[3] that the complaint here, fn. 2, *supra*, did not contain a statement of the essential facts; and that upon the taking of the testimony of the affiant it was apparent that the statements made by him were not within his personal knowledge, but must have been based upon information furnished by others.

The Government counters by saying that the allegation of receiving and concealing heroin hydrochloride with knowledge of unlawful importation was substantially in the words of the statute,[4] and that this was sufficient to state the crime of which appellant was charged. Further the Government says that so long as the complaint is sworn to positively and not on information and belief, it is immaterial on the question of validity of the warrant that the officer did not acquire his knowledge of the facts from personal observation. Finally the appellee takes the position that the preliminary hearing is the place to raise all questions as to the validity of the arrest, and a waiver of

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[3] This is in accord with Rule 3, Federal Rules of Criminal Procedure, which provides:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

[4] 21 U.S.C.A. §174.

such hearing makes such defense unavailable to the accused later in the trial.

In view of the fact that the ground for our decision makes unnecessary an inquiry into the questions whether the [fol. 120] arest was actually made on the warrant; whether the complaint contained an adequate statement of the essential facts; and whether the warrant was valid if issued without the personal knowledge of the affiant of the facts asserted, we go directly to the final point made by the Government.

When, as here, a person is arrested upon a warrant issued on a complaint he must be brought before the nearest United States Commissioner, without unreasonable delay.[5] It then becomes the duty of the Commissioner to inform the defendant of the charge and of his right to a preliminary hearing at which he can inquire into the probable cause of the arrest. If the defendant waives preliminary examination the Commissioner holds him forthwith to answer in the district court.[6]

Here appellant was represented by counsel at his commitment hearing, and, as authorized under the rules, he waived preliminary examination, a proceeding at which he would have had full opportunity to test out the sufficiency of the complaint and legality of the warrant and the legality of his arrest under in or the presence of probable cause if arrested without a valid warrant.

We are much persuaded by the language of the opinion in *United States v. Walker* (2 Cir.), 197 F 2d. 287; cert. denied 344 U.S. 877, where the court dealt with the three important points here at issue: Sufficiency of the complaint as to statement of essential facts; sufficiency of the complaint as to the personal knowledge of the offense; and [fol. 121] the waiver of defects in the complaint by waiving preliminary examination. There the court said:

> "The appellant contends that his arrest was illegal because (1) the complaint did not set forth 'the essential facts constituting the offense charged.' as required by Rule 3, F.R.Cr.P.; (2) the complaint did not set forth the source of the government agent's information.

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[5] Fed. Rules Cr. Proc., Rule 5(a), 18 U.S.C.A.

[6] Fed. Rules Cr. Proc. Rule 5(b)-(c).

Taking up these points seriatim, it appears that the complaint, printed in the margin, substantially follows the statutory language of the offense charges, 18 U.S. C.A. §2314. Since an indictment in the words of the statute may be sufficient, Carter v. United States, 10 Cir., 173 F. 2d 684, certiorari denied 337 U.S. 946, 69 S.Ct. 1503, 93, L.Ed. 1749, a complaint in the same form may likewise be; such is the case here. Point (2) seems to be answered by the fact that on its face the complaint appears to be based on personal knowledge of the complainant. See Rice v. Ames, 180 U.S. 371, 376, 21 S.Ct. 406, 45 L.Ed 577. When arraigned before the commissioner in Maryland the appellant could have challenged the complaint on the ground that the complainant did not have personal knowledge, but his waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence. In our opinion the appellant has not established that his arrest was illegal."

United States v. Walker (2 Cir.), 197 F. 2d 287, at 289. To be sure the waiver in the Walker case was held by the court to apply only to the raising of the objection to the fact that the affiant did not have personal knowledge of the [fol. 122] facts alleged. We can see no basis for not applying the same rule to the other objection, the sufficiency of the statement of fact. Both are based on the same provision of the Fourth Amendment to the Constitution, and neither is less subject to waiver than the other. Nothing to the contrary appears in the opinion of Judge Augustus N. Hand in the district court case of *United States v. Ruroede* (S.D.N.Y.) 220 Fed. 210, 213. In that case there was no suggestion of the gist of the offense of which the defendant was charged, and the court properly held there would be no waiver, because the invalidity was plain on the face of the complaint and warrant. Here there is no such defect. There can be no serious contention made that Giordenello was not clearly apprised of the offense for which he was arrested.

We conclude therefore that if there were defects in the warrant and if the arest was made without proper warrant

or probable cause, which we discuss later but do not here decide, such defects could have been inquired into at the preliminary examination; that the waiver by appellant of the preliminary examination constituted a waiver of any such defects and he will not be permitted to raise the issues by motion later.

Much can be said moreover in support of the other points on which the Government relies to sustain the trial court's action.

As to the sufficiency of the statement of the offense, it is difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged [fol. 123] than the language of the statute here used in the complaint. This is legally sufficient. *Brown v. United States*, 222 F. 2d. 293. The warrant would therefore not be invalid for this reason.

As to the objection that it must affirmativey appear that the officer made the complaint on his own personal knowledge, it has been held by the Supreme Court that if a complaint purports to be on the knowledge of the affiant this is sufficient to authorize the issuance of the warrant. *Rice* v. *Ames*, 180 U. S. 371; *United States* v. *Walker, supra;* and see the language of the Supreme Court in the recent case of *Costello* v. *United States*, 350 U.S. 359, where on page 353 the Court, speaking of the validity of an indictment based entirely on hearsay testimony said:

> "An indictment returned by a legally constituted and unbiased grand jury, *like an information drawn by the* prosecutor, if valid on its face, is enough to call for the trial of the charge on the merits. The Fifth Amendment requires nothing more." (Emphasis added.)

Moreover, it is difficult to see why a strict rule nullifying a complaint because based partially on the evidence of others can now be urged in the light of the Costello case in which the sole issue was whether an indictment based wholly on hearsay evidence was valid.

As to the delay in the use of the warrant, nothing has been cited to cause us to hold that, once armed with a warrant valid on its face, an officer is denied the right to execute it at a time when he can catch the accused "with the goods." [fol. 124]. There was evidence of reports coming to Finley

that caused him to believe Giordenello would obtain heroin from Chicago. He placed him under surveillance for weeks. Giordenello disappeared and later returned; he was driving an expensive automobile bearing an Illinois license; he drove to the place where he was arrested with a local suspicious character following him in another car bumper to bumper.[7] These facts would not have been sufficient to justify the use by Finley of the warrant solely as "an investigative technique," if by that it was meant that it was obtained not for the purpose of arresting Giordenello for the commission of the offense charged, but as an excuse to search him. Finley swore positively that such was not the case. Moreover, there was enough in the record to make it clear that an honest official might well have thought he was fully observing the legal restraints placed upon his actions, and that he had good cause for arrest even if the warrant already obtained was invalid since he believed he saw a felony being committed in his presence—a belief that subsequent events proved to be true.

We recite these facts in spite of our holding that the waiver was sufficient to meet the objections raised by appellant because it is clear from the record as a whole that no injustice is being worked on the accused by holding him to his waiver.

Many roadblocks to the swift visitation of punishment on even such criminals as purveyors of heroin are, and must [fol. 125] be, thrown up to assure a full measure of constitutional protection for the accused. That this sometimes makes difficult the apprehension and punishment of the guilty must be accepted as one of the prices we pay for constitutional government. There is a limit, however, beyond which the courts should not go. That limit, we think, has been reached when as in this case the person accused was accorded every opportunity to be informed of the nature and source of the charge against him, to test out the validity of his arrest and the strength of the Government's

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[7] While this evidence could not be admitted as proof of guilt, it was admissible to show the reasonableness of Finley's waiting and selecting the particular time and place to arrest Giordenello.

case in a preliminary hearing and, having waived these privileges, he still had the right to a jury trial on the merits.

We think the evidence was properly admitted by the trial court and the judgment is

Affirmed.

RIVES, *Circuit Judge, Dissenting:*

The arrest and search of the appellant were, I think, clearly contrary to the provisions of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be searched, and the persons or things to be seized."

[fol. 126] Courts are under a solemn, an almost sacred, duty to defend the Constitution, and should never succumb to the temptation to countenance a violation of that amendment in order to apprehend or punish one guilty of a crime.[1] Otherwise, ultimately the clear provisions of that section of our Bill of Rights will become no more than a dead memorial to a liberty so dearly bought by our ancestors, and so uselessly expended by later and softer generations.

"Uselessly expended" because, when officers are trained to understand the Fourth Amendment, it presents no real obstacle to efficient law enforcement, but simply requires the interposition of a neutral and detached magistrate be-

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[1] "The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent." Agnello v. United States, 269 U.S. 20, 32; see also, United States v. Lefkowitz, 285 U.S. 452, 464; Worthington v. United States, 6th Cir., 166 F. 2d. 557, 562.

The statement just made in the body of the opinion is not intended to imply any belief or doubt on my part but that my brothers are trying to follow the Constitution just as sincerely as I am. To the contrary, I have complete confidence in their honesty, intellectual and otherwise.

tween a policeman or a zealous government enforcement agent and the right of privacy of an individual citizen.[2]

The explicit language of the Amendment itself leaves no doubt possible that it covers warrants of arrest as well as search warrants, and it has often been so held.[3]

[fol. 127] In the present case, the complaint of the narcotic agent upon which the warrant was issued (copied in footnote 2 to the main opinion) contained no more than the bare conclusions of the officer practically in the language of the statute. My brothers adopt the holding of the Second Circuit that,

> "Since an indictment in the words of the statute may be sufficient, Carter v. United States, 10 Cir., 173 F.2d 684, certiorari denied 377 U.S. 946, 69 S.Ct. 1503, 93 L.Ed. 1749, a complaint in the same form may likewise be; such is the case here." *United States* v. *Walker*, 2d Cir., 197 F.2d 287, 289.

With deference, I submit that that holding is a non-sequitur. The case cited by the Second Circuit in support of the holding, *Carter v. United States*, 10th Cir., 173 F.2d 684, passed upon the validity of an indictment as a *pleading*, and did not involve the validity of an arrest. It referred to the provision of the Sixth Amendment that, "In all criminal prosecutions, the accused shall enjoy the right * * * * * to be informed of the nature and cause of the accusation." As a matter of pleading, when the statute embodies all the elements of the crime, an indictment following substantially the wording of the statute meets the requirements of the Sixth Amendment, and, "If the defendants wanted more definite information, * * *, they could have obtained it by

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[2] Johnson v. United States, 333 U.S. 10, 13-14; Rent v. United States, 5th Cir., 209 F. 2d. 893, 898; Clay v. United States, No. 15,996, December 11, 1956, m/s.

[3] Ex parte Burford, 7 U.S. (3 Crouch) 448, 453; Albrecht v. United States, 273 U.S. 1, 5; McGrain v. Dougherty, 273 U.S. 135, 156; Go-Bart Co. v. United States, 282 U.S. 344, 357 De Hardit v. United States, 4th Cir., 224 F. 2d. 673, 677; Wrightson v. United States, D.C.Cir., 222 F. 2d. 556, 557; Worthington v. United States, 6th Cir., 166 F. 2d. 557, 562; United States v. Horton, W.D.Mich., 86 F.Supp. 92, 97.

requesting a bill of particulars." *United States v. De Brow*, 346 U.S. 374, 378; see, also, *Rosen v. United States*, 161 U.S. 29, 34.[4] The added "probable cause" requirement of the Fourth Amendment for the issuance of a war- [fol. 128] rant is rarely applied to indictments or informations, though occasionally bench warrants do issue upon them. In each such instance, however, the existence vel non of probable cause is not left to the arresting officer, but there is interposed the Grand Jury in the case of indictments, the United States Attorney in the case of informations, and in all cases the court before issuing the bench warrant. As said by Judge Prettyman in *Wrightson v. United States*, D.C.Cir., 222 F.2d 556, 558:

> "For a warrant to be issued upon a complaint probable cause must appear from the complaint, and, of course, probable cause is inherent in an indictment or information."

The "probable cause" requirement of the Fourth Amendment as a prerequisite to the issuance of a warrant is different and in some ways more stringent than the pleading or notice requirements of the Sixth Amendment.

A United States Commissioner acts in a judicial capacity and should issue a warrant only upon competent evidence. The facts, and not the complainant's conclusion from the facts, should have been before the commissioner. *Worthington v. United States*, 6th Cir., 166 F. 2d. 557, 565. What was said by the First Circuit in *Giles v. United States*, 284 Fed. 208, 214, is true here:

> "In this case, as no facts whatever were put before the commissioner, he was ousted from his judicial function, and remitted to a performance purely perfunctory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer [fol. 129] serving the writ. This is a very dangerous amalgamation of powers."

See, also, *United States v. Ruroede*, S.D.N.Y., 220 Fed. 210, 212.

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[4] Appellant's first opportunity to apply for a bill of particulars came after his arrest and search had been effected.

Nowhere has the requirement been stated more clearly than by Judge Bryant in *United States v. Gokey*, S.D.N.Y., 32 F. 2d. 793, 794:

> "The commission of a crime must be shown by facts, positively stated before a commissioner has jurisdiction to issue a warrant of arrest. This protection is guaranteed to every person by the Constitution (Fourth Amendment) through the provision that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation.' This safeguard of liberty has been jealously protected by all courts. And well it should be, for it would be intolerable to allow a warrant of arrest to be issued upon the opinions, conclusions, or suspicion of some person, unsupported by facts. The 'oath or affirmation' required is of facts, not opinions or conclusions. The complaint must be supported by proof, so that the magistrate may exercise his judgment or discretion in determining that an offense has been committed, and that there is probable cause to believe the accused guilty of the commission thereof."

If by simple rote in copying the language of the statute, and without any facts in support of his conclusions, the complaining officer could supply the "probable cause" required by the Fourth Amendment, then indeed has that [fol. 130] requirement become purely formal and ritualistic and utterly deficient as a real and genuine protection to the privacy of the individual for which it was intended.

"United States commissioners are inferior officers." *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357. They have such authority only as is conferred upon them by valid statute or rule. Their authority to issue warrants of arrest is that prescribed by Rules 3 and 4(a), F.R.Crim. Proc.:

> "Rule 3. *The Complaint.*
>
> "The complaint is a written statement of *the essential facts constituting the offense charged.* It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States." (Emphasis supplied.)

"Rule 4. *Warrant or Summons upon Complaint.*

"(a) . . . *Issuance . . . If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it,* a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." (Emphasis supplied.)

Thus, "probable cause" must appear "from the complaint" itself, and the "essential facts" must be stated in the complaint. In the safeguarding of such fundamental human rights, the rules wisely leave nothing to speculation nor to oral testimony as to what was before the commissioner.

[fol. 131] The officer testified positively that in arresting the appellant he was executing the arrest warrant.[5] Though examined at length by counsel for the appellant, and obviously evasive, he never would testify that he saw the accused commit any crime.[6]

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[5] "Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?.

"A. As he attempted to approach his Cadillac, yes, sir."

At another place he testified:

"Q. Did you have in your possession at that time to exhibit to the defendant a warrant of arrest?

"A. I did.

"Q. Did you execute the warrant of arrest?

"A. I did."

[6] "Q. Well, from the time of the investigation up until the time you arrested him, you, yourself, never did see him do anything wrong, did you?

"A. I wouldn't say that, no, sir. I couldn't answer no to that question.

"Q. I mean violate any of the U. S. laws.

"A. Well, that is a difficult question to answer. I wish you would rephrase it, or reword it, if you possibly can, so I can better understand it.

"Q. Well, it is not my attempt to trap you in any question. I say from the time the investigation began until the 27th or 26th day of January, you never saw Veto Gior-

[fol. 132] The claim that the arrest can be justified as one for a different offense made without a warrant was actually put forward not by the arresting officer, but by Government counsel, and is a distinct afterthought. The

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denello violate any of the laws of the United States of America, did you?

"A. Not that I am prepared to prove now, no, sir.

. . . . . .

"Q. You hadn't seen him violate any law at the time you swore out the first warrant on January 26th, had you?

"A. That is the same answer. I can't say no to that question.

"Q. But I am speaking of your own knowledge, Mr. Finley.

"A. Well, of my own knowledge I would say that the answer to your question is no, or rather it is undetermined. It is not no, and it is not yes, that I am prepared to prove or state now.

. . . . . .

"Q. Well, at the time you did arrest him on the 27th, you hadn't seen him violate the law before you served the warrant, had you?

"A. That is the same question again, Mr. Scott. I can't say whether I did or didn't at this time.

"Q. I will ask you the question this way; you went out in the vicinity of Lathrop and Brownsville Streets, didn't you?

"A. On the 27th day of January, 1956, yes, sir.

. . . . . .

"Q. Were you in an automobile there?

"A. Yes, sir.

"Q. Did you park your car?

"A. I did, sir.

"Q. Where?

"A. Just off of the intersection of Brownsville and

appellant was charged with the different and later offense for the first time in the indictment. No complaint was filed with the commissioner for any such offense as would have been required by Rule 5(a), F.R. Crim.Proc., had he been arrested therefor,[7] and appellant was committed simply for the offense for which the warrant was issued. On that earlier offense the arresting officer had had ample time to get a warrant, as is evidenced by his having in fact secured a void warrant based upon his own sheer conclusions. As said by Judge Brown for this Court in [fol. 133] the recent case of *Clay* v. *United States*, No. 15,996, December 11, 1956, m/s:

> "Finally, while the ease and practicability of obtaining the warrant of arrest or to search, Trupiano v. United States, 334 U.S. 699, 92 L.Ed. 1663, is no longer an invariable rule of thumb, United States v. Rabinowitz, 339 U.S. 56, 94 L.Ed. 653, availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause."

Lathrop. I believe it is the northeast corner of that intersection.

"Q. Did you see the defendant Veto Giordenello there?

"A. I did, yes, sir.

"Q. What was he doing?

"A. Well, he was doing several things during the time that I saw him.

"Q. What did you see him do prior to the time you—

"A. I saw him drive his 1955 Cadillac; I saw him get out of that Cadillac; I saw him go into an address at 6827 Brownsville Street; I saw him come out of that address; I saw him go into a garage; I saw him come out of the garage—

"Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?

"A. As he attempted to approach his Cadillac, yes, sir."

[7] Rule 5(a), F.R.Crim.Proc., provides in part:

"When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

See, also, *Shurman* v. *United States*, 5th Cir., 219 F. 2d 282; *Rent* v. *United States*, 5th Cir., 209 F. 2d 893.

Actually, it seems clear to me that the officer did not know, nor have probable cause to believe, that the appellant was committing a felony until he had arrested him, seized the paper sack from his hand, and searched that sack.[8] If the arrest had then been made for the different and later offense, it would come squarely within what was said by this Court in *Walker* v. *United States*, 225 F. 2d. 447, 450: "The arrest of appellant followed and did not precede the search and was based upon the result of the illegal search." The crime involved in *Walker* v. *United States*, *supra*, and that involved in *Johnson* v. *United States*, *supra*, upon which the Walker Case relied, come much nearer being committed in the presence of the officers than did the crime charged in this case.

My brothers hold, however, that the legality of appellant's arrest and search was effectively and finally con- [fol. 134] ceded because not objected to at the preliminary hearing and again they rely upon *United States* v. *Walker*, 2nd Cir., 197 F.2d 287. That case differs from this in many material respects.

In the first place it was not a direct appeal, as here, but was a collateral attack by motion under 28 U.S.C.A. 2255, and the Second Circuit commented that, "Such a motion cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights." 197 F. 2d. at p. 288.

Further in that case, the search was not incidental to an arrest, as here, but the defendant in that case, while under arrest for a different offense, had confessed the crime for which he was later indicted and convicted and had consented to a search of his trunks which produced the evidence used at the trial. The Second Circuit further commented:

> "The evidence obtained by search was found in the appellant's luggage which was in the possession of Mrs. Ashe, who consented to the search. As we stated

[8] The ninety-five papers or bindles containing a mixture of one ounce of heroin and five ounces of milk sugar were in a brown manila envelope inside the paper sack.

on the prior appeal, United States v. Walker, 2 Cir., 190 F. 2d. 481, 483, the appellant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession." 197 F. 2d. at p. 289.

The most important distinction between that case and this is that there the Second Circuit did *not* hold that Walker's waiver of examination precluded him from thereafter objecting on the ground that the complaint upon [fol. 135] which the warrant was issued did not set forth the essential facts constituting the offense charged, but held to be waived that part of what the Second Circuit called point (2) objecting that the complainant did not have personal knowledge of the facts and had not sustained his complaint by legally competent evidence.[9] I quote the exact language of the Second Circuit:

"* * * When arraigned before the commissioner in Maryland the appellant could have challenged the complaint on the ground that the complainant did not have personal knowledge, but his waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence.[6]

"6. See United States v. Ruroede, D.C.S.D.N.Y., 220 F. 210, 213, where Judge Augustus N. Hand said: 'His waiver will prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint. * * * The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words, to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more.' Compare United States ex rel. King v. Gokey, D.C. N.D. N.Y., 32 F. 2d 793, 795."

[9] An objection regarded as a mere informality or irregularity as is evidenced by the quotation in the succeeding footnote 6 to that opinion, quoted infra.

[fol. 136] True, the Second Circuit had already held that the complaint in that case did set forth the essential facts constituting the offense charged, and, with deference, I have hereinbefore questioned the soundness of that holding. Whether sound or not, however, it was in effect a holding by the Second Circuit in that case that the complaint was sufficient to confer jurisdiction on the commissioner to issue the warrant. The distinction is made entirely clear, indeed obvious, if, instead of the extracts quoted from Judge Augustus N. Hand in footnote 6 to the Second Circuit's opinion, quoted *supra*, we read the entire paragraph of Judge Hand's opinion.

"It is urged, however, by the United States attorney, that, inasmuch as the prisoner at the hearing before the commissioner waived examination, he is debarred now from complaining of his confinement pending an investigation by the grand jury. There is no doubt that a waiver of examination does debar a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding; but I do not think that any cases cited by the United States attorney have gone so far as to hold that a waiver of examination cured a complaint which upon its face discloses no facts indicating the commission of a crime. While the government in any case is justified as far as possible in keeping secret its evidence until a matter has been submitted to the grand jury, it cannot, I think, sustain a warrant of arrest for any reason or under any circumstances, where neither the warrant nor the complaint state facts constituting the crime that is charged, even though the prisoner has at the hearing waived examination. His waiver will [fol. 137] prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint; but it does not, I think, debar him from attacking a process which does not upon its face state the facts which constitute the crime charged. The meaning of the waiver is, I think, simply this: The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words,

to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more. He has never by any conduct of his waived the right to object to the fact of being held upon a complaint which states no cause of action and upon a process which is, therefore, void." *United States* v. *Ruroede*, 220 Fed. 210, 213-214.

Again the distinction appears from the other case referred to in footnote 6 to the Second Circuit's opinion, *supra*, *United States ex rel. King* v. *Gokey*, D.C.N.D.N.Y. 32 F.2d. 793, 795, where Judge Bryant said:

"The fact that the records show that relator upon arraignment waived examination, and consented to await the action of the District Court, does not estop him from now questioning the legality or sufficiency of the complaint. A waiver of examination, if one is had, debars a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding, but it does not, I think, deprive him of the right to attack a process insufficient to confer [fol. 138] jurisdiction. U.S. v. Ruroede (cited above); People ex rel. Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383, 11 L.R.A. (N.S.) 528, 10 Ann. Cas. 309."

A somewhat similar question was presented to the Supreme Court in *Albrecht* v. *United States*, 273 U.S. 1, where the information filed by the United States Attorney, upon which a bench warrant issued, had not been verified by the United States Attorney but was supported only by the affidavits of witnesses sworn to before a notary public—a state official not authorized to administer oaths in federal criminal proceedings. Mr. Justice Brandeis, speaking for the Court, said:

"* * * A bench warrant issued; and the marshal executed it by arresting the defendants. When they were brought into court, each gave bond to appear and answer; was released from custody immediately; and was not thereafter in custody by virtue of the warrant or otherwise. At the time of giving the

bonds, no objection was made to either the jurisdiction or the service by execution of the warrant; and nothing was done then indicating an intention to enter a special appearance. * * *

"The bail bonds bound the defendants to 'be and appear' in court 'from day to day' and 'to answer and stand trial upon the information herein and to stand by and abide the orders and judgment of the Court in the premises.' It is urged there was a waiver by giving the bail bonds without making any objection. We are of the opinion that the failure to take the objection at that time did not waive the invalidity of the warrant or operate as a general appearance." 273 U.S. at pp. 4 and 9.

[fol. 139] Further on in that opinion, Mr. Justice Brandeis makes it clear that, if we assume the existence of competent evidence to prove probable cause, it would be utterly futile to demand a preliminary hearing in order to object to an illegal arrest. Commitment, or, if necessary, rearrest and ultimate commitment, would result from the preliminary hearing just the same.

No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client when charged with a different offense to object to the legality of his original arrest and the search that followed. Instead of thus stretching conduct not so intended into a waiver, we should, I think, "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, quoted and approved in *Emspak* v. *United States*, 349 U.S. 190, 198, and relied on by this Circuit in *Ballantyne* v. *United States*, 237 F. 2d. 657, 665, 669.[10]

Being of the firm view that the warrant was invalid, the arrest illegal, and the search unauthorized, I respectfully dissent.

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[10] Further, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Gouled v. United States, 255 U.S. 298, 313; quoted and approved in Agnello v. United States, 269 U.S. 20, 34, 35.

[fol. 140] IN UNITED STATES COURT OF APPEALS

No. 16,065

VETO GIORDENELLO,

versus

UNITED STATES OF AMERICA

JUDGMENT—January 31, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissenting."

[fol. 141] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed February 21, 1957

To the Honorable Court of Appeals for the Fifth Circuit:

Veto Giordenello, appellant named above, presents this petition for rehearing in the above entitled case and in support thereof respectfully shows:

[fol. 142] I

The Court erred in holding that appellant lost his constitutional rights in one case by waiving a preliminary hearing in another case for the following reasons:

A. The preliminary hearing itself is not final and no ruling which the Commissioner could have made in appellant's favor would prevent further charges against appellant based on the same evidence. *Collins v. Loisel*, 262 U.S. 426, 429; *United States v. Gray*, 87 F. Supp. 436, 437.

B. The effect of the principal opinion is to amend Rule 41, Federal Rules of Criminal Procedure, by adding a proviso that the District Court's power to rule on the evidence depends on the proceedings before "inferior officers" (*Go-Bart Co. v. United States*, 282 U.S. 34, 357) although, "The sole express authority for a pre-trial suppression of the evidence by any court other than a trial court is found in Rule 41e." *United States v. Klapholz*, 230 F. 2d. 494, 496.

II

The Court's dicta to the effect that Mr. Finley had probable cause to arrest appellant without a warrant is based on evidence not presented at the hearing on the motion to suppress and found only as a part in the record of trial in which appellant was denied the right to cross-examine the witness. See R. 77.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that [fol. 143] judgment of the District Court be, upon further consideration, reversed.

(S.) William F. Walsh, Esq., 1116 Capital Avenue, Houston 2, Texas. Clyde W. Woody, Esq., 303 Legal Arts Building, Houston 2, Texas.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

(S.) William F. Walsh, Esq.

Certificate of Service (omitted in printing).

[fols. 144-147] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 17, 1957

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissenting."

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] SUPREME COURT OF THE UNITED STATES
October Term 1957

No. 22 Misc.

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 14, 1957.

In petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 549 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1958

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The District Court did not render an opinion. The opinion of the Court of Appeals, affirming this conviction by a divided panel (R. 59-77), is reported at 241 F.2d 575.

Jurisdiction

The opinion (R. 59) and judgment (R. 78) of the Court of Appeals are dated January 31, 1957; a petition for rehearing (R. 78), timely filed, was denied May 17, 1957 (R. 79).

The petition for a writ of certiorari, filed June 5, 1957, was granted October 14, 1957. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

Constitutional Provisions and Rules of Criminal Procedure Involved

The United States Constitution, Article III, Section 1, provides in pertinent part:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..."

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in pertinent part that:

"Excessive bail shall not be required . . ."

Rule 2 of the Federal Rules of Criminal Procedure provides:

"These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Rule 3 of the Federal Rules of Criminal Procedure provides:

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it."

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on

the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Questions Presented

I.

A narcotics agent, who had no personal knowledge that petitioner committed any crime, swore to a complaint which stated no evidentiary facts. He obtained an arrest warrant from a United States Commissioner and carried it for two days as an "investigative technique" while following the petitioner. He then searched petitioner during an arrest under the warrant.

Is this search reasonable within the meaning of the Fourth Amendment to the United States Constitution?

II.

Arrested for one offense, petitioner waived preliminary hearing before the United States Commissioner. Indicted for a different offense, he moved to suppress the evidence seized during his arrest. The Court of Appeals held that he waived his right to suppress the evidence when he waived preliminary hearing.

Did petitioner forfeit all opportunity to exercise his constitutional rights against unreasonable searches when he waived preliminary examination as to an offense for which he has not been indicted to this day?

Statement of the Case

A. The Form of the Complaint and Warrant

Petitioner was arrested on January 27, 1956, in Houston, Texas, by William T. Finley (R. 19, 31), "an enforcement agent for the United States Treasury Department, Federal Bureau of Narcotics" (R. 15, 30). Mr. Finley testified that he was executing an arrest warrant (R. 20, 21, 24) and that he found a quantity of heroin in a paper bag in petitioner's hand at the time of the arrest (R. 26).

Petitioner moved the trial court to suppress the heroin as evidence (R. 2), claiming that the search of his person was unlawful. At a pre-trial hearing on the motion (R. 4-27), he introduced the warrant (Ex. 2, R. 11) and the complaint upon which the warrant was based (Ex. 3, R. 13).

The complaint alleged only that on January 26, 1956, the petitioner ". . . did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride, with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code" (Ex. 3, R. 13). No material witnesses were listed on the complaint, which was sworn to before the U. S. Commissioner by Mr. Finley alone (R. 13).

The warrant was addressed, "To U. S. Marshal or any other authorized officer" (R. 11). Although the return was signed by a female Deputy United States Marshal (R. 12), the evidence clearly establishes that the warrant was actually executed by Mr. Finley. There is no contention that the U. S. Marshal or any of his deputies had anything to do with this arrest.

B. The Extent of Complainant's Knowledge of the Facts

Although Mr. Finley, ". . . had kept a surveillance on this man beginning the latter days of December" (R. 18) or since

"before Christmas" (R. 22), Mr. Finley "hadn't seen Giordenello with narcotics in his possession" (R. 17) and had not "seen him receive or conceal any heroin hydrochloride" (R. 16).

When asked, ". . . from the time the investigation began until the 27th or 26th day of January, you never saw Veto Giordenello violate any of the laws of the United States of America, did you?", Mr. Finley replied, "Not that I am prepared to prove now, no sir." (R. 22).

Mr. Finley claimed that he had received "information" from "More than two sources" (R. 17-18), including "other law enforcement officers" (R. 18), ". . . whereby it would indicate that Giordenello was in possession of the heroin at the time I swore to it" (R. 18). He said that these persons were residents of Houston, but that "it didn't enter my mind whether they were available to swear before the Commissioner or not", and that he did not obtain affidavits from them (R. 19). He explained, "I swore to the complaint myself on the basis of their information" (R. 18).

Mr. Finley would not establish a clear distinction between what he had seen and what he had heard from others. He said:

> "I had kept a surveillance on this man beginning the latter days of December, as I said before, and was in possession of information which corroborated my surveillance, and vice versa my surveillance corroborated my information that he was in Houston, and planned to go to Chicago, Illinois, to bring back a large supply of heroin, and he did leave, and he did return, and my surveillance did corroborate that information. In addition to that, I received information from other law enforcement officers that he was in town with that large quantity of heroin" (R. 18).

When the defense endeavored to separate Mr. Finley's knowledge from his information, the U. S. Attorney objected to leading questions (R. 16, 20, 21, 23) and made it clear that he considered Mr. Finley to be the defense's "own witness" (R. 16) "however adverse the proceedings might be" (R. 20). The trial judge sustained such objections (R. 16, 21).

Denied the right to use the techniques of cross-examination at the pre-trial hearing, the defense was also denied the right to cross-examine Mr. Finley at the trial itself. The U. S. Attorney objected to questions about the arrest ". . . in that (th)is has already been gone over in the previous motion, going to the validity of the complaint" (R. 42). The judge sustained the objection and said, "We can go forward on the facts. That is the matter we heard last Friday" (R. 42).

C. The Execution of the Warrant

With regard to the actual arrest, Mr. Finley told the court that, "The warrant was issued on the 26th, it was effective on the 26th, and I saw him after the warrant was issued" (R. 23).

At about 6 p.m., January 27th, 1956, Mr. Finley saw petitioner "in the area of 2901 Airline Drive, Houston, Texas" (R. 21). Mr. Finley had his warrant at that time too, but made no arrest (R. 21). Asked whether anyone kept him from executing the warrant, Mr. Finley replied, "I kept myself from it" (R. 21). He admitted that he could have placed petitioner under arrest at that time (R. 22).

Later, Mr. Finley went to 6827 Brownsville Street, saw petitioner, and executed the warrant of arrest (R. 24), seizing from petitioner a bag containing a substance (R. 26) later identified by a government chemist as less than an ounce of heroin mixed with five ounces of some other substance (R. 50).

Mr. Finley denied that he obtained the warrant so that he would have a chance to search the petitioner at an opportune time (R. 23). He explained that, "there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" and that the execution of the warrant "... was an investigative technique on my own. It was a decision I made myself" (R. 22).

D. The Preliminary Hearing, Indictment, Trial and the Opinion of the Court of Appeals

The U. S. Commissioner's records reflect that on the day after the arrest, petitioner appeared with counsel, waived preliminary examination, and was held for the District Court in $25,000.00 bond (Ex. 1, R. 9). The lawyer who appeared with petitioner before the Commissioner (R. 9), did not afterward represent him on trial (R. 4, 28) or on appeal (R. 57, 79).

Although the complaint alleged that petitioner violated 21 USC 174 on January 26, 1956, by receiving and concealing heroin imported illegally (Ex. 3, R. 13), the two-count indictment charged him with the revenue offense of purchasing heroin not in or from the original stamped package (R. 1) and with transferring illegally imported heroin (R. 2) on January 27, 1956. Petitioner has never been indicted for the offense charged in the complaint.

By the time of trial, the government abandoned the allegation regarding importation and moved to dismiss that count of the indictment (R. 29).

Although the government filed no answer to the motion to suppress (R. 3), the motion was overruled (R. 28), the heroin was admitted into evidence (Exs. 1A and 1B, R. 36) over repeated objections (R. 32, 34, 36, 44, 49), and petitioner was convicted of possession of untaxed narcotics

(R. 51). He was sentenced to eight years confinement and a $25.00 fine for violation of 26 USC 4704 (R. 53).

The Court of Appeals affirmed the conviction by a divided panel, the majority deciding that petitioner waived his right to object to the legality of the arrest when he waived preliminary hearing (R. 63-64). The dissenting judge said that, "The arrest and search of the appellant were, I think, clearly contrary to the provisions of the Fourth Amendment" (R. 66) and observed (R. 77):

> "No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client, when charged with a different offense to object to the legality of his original arrest and the search that followed."

Summary of Argument

The opinion of the Court of Appeals authorizes arrests and searches in the unbridled discretion of government agents.

The only evidence of the offense for which the petitioner has been convicted was seized from him during an arrest based on a warrant. The warrant, in turn, was based on an affidavit which alleged, in the language of the statute, that petitioner had committed a different offense on the day before the arrest. No evidentiary facts were stated in the affidavit, as required by *Giordenello* v. *United States*, 287 US 124, 128.

The complaining witness (the arresting officer) testified that he had never seen petitioner violate any of the laws of the United States (R. 22). His complaint thus violated the constitutional requirement that an affidavit for a warrant must actually be based on personal knowledge. *United*

States v. *Longsdale*, 115 F. Supp. 489; *King* v. *Gokey*, 32 F. 2d 793, 795; *Schencks* v. *United States*, 2 F.2d 185, 186.

Because no facts were stated in the affidavit, and because only the arresting officer knew the insufficient facts available, the warrant was issued without the "informed and deliberate determinations" of a "neutral and detached magistrate", as required by *United States* v. *Lefkowitz*, 285 US 452, 464, and *Johnson* v. *United States*, 333 US 10, 14. Warrants obtained under such conditions come perilously close to the Colonial writs of assistance which placed "'. . . the liberty of every man in the hands of every petty officer'". *Boyd* v. *United States*, 116 US 616, 625.

The Fifth Circuit declined to decide whether the arrest was legal (R. 62). That Court concluded that petitioner waived his constitutional rights as to the offense for which he has been convicted by waiving preliminary hearing on the different offense for which he was arrested (R. 64).

"Waiver is the intentional abandonment of a known right, not a trick to catch one napping." *McKee* v. *McGhee*, 114 S.C. 183, 103 SE 508; *National Life & Acc. Ins. Co.* v. *Varner*, 171 Tenn. 95, 100 SW 2d 662, 664.

Petitioner could not know, when he waived preliminary hearing, that he would later be indicted for some different offense. Had he demanded a preliminary hearing, the Commissioner could have made no ruling which would have protected him from further prosecution based on the same evidence. *Collins* v. *Loisel*, 262 US 426, 429. After indictment, petitioner's lawyers filed a timely motion to suppress the evidence, a practice followed consistently during the 44 years since *Weeks* v. *United States*, 232 US 383, and now embodied in Rule 41(e) of the Federal Rules of Criminal Procedure.

To affirm this conviction on the doctrine of waiver is to set a trap inconsistent with the requirement that the Federal Rules of Criminal Procedure ". . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2).

ARGUMENT

I.

This Petitioner Was the Victim of a Patently Illegal Arrest; Evidence Seized From Him at That Time Should Not Be Admitted Against Him.

The most important question in this case was not decided by the Court of Appeals. Basing its opinion only on the doctrine of waiver, the majority below came to the conclusion that it was "unnecessary" (R. 62) to determine whether petitioner's arrest was lawful. The constitutional question was left in the status of problems ". . . which we discuss later but do not here decide . . ." (R. 64).

A. The Arrest Was Made on the Basis of a Warrant

The record makes it clear that this case involves an arrest sanctioned only by a warrant, if at all.

Describing the arrest during a hearing on petitioner's motion to suppress the evidence, Mr. Finley repeatedly admitted that he was executing the warrant when he arrested petitioner (R. 20, 21). At the U. S. Attorney's request, the judge took judicial notice ". . . that the defendant in this case was arrested on a complaint and warrant" (R. 37).

In its brief opposing the petition for certiorari, the government conceded that petitioner was arrested ". . . on the basis of the warrant . . ." (Br. 2) and that under law in effect at the time of the arrest Mr. Finley had no power to

arrest without a warrant on the facts in this record (footnote, Br. 5).[1]

B. The Complaint Did Not State the "Essential Facts" Necessary for Issuance of a Warrant

Although the Federal Rules of Criminal Procedure require that a complaint state, " . . . the essential facts constituting the offense charged" (Rule 3), the complaint in this case alleges no facts at all. The complaint merely outlines the legal conclusion of a narcotics agent that petitioner " . . . did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation in violation of Section 174, Title 21, United States Code" (Ex. 3, R. 13).

Such a complaint not only violates a procedural rule—it is in derogation of a right characterized as constitutional in the Federal courts.

> "It is, of course, axiomatic, that under Amendment 4 of the Constitution of the United States, facts must be alleged upon which the warrant is issued, as distinguished from conclusions." *United States* v. *Boscarino*, 21 F.2d 575, 576.

> " 'Probable cause', as used in the Fourth Amendment, fixes a legal standard and does not relate to a verbal

[1] The statute authorizing narcotics agents to serve warrants and to arrest without warrants upon "reasonable grounds" was not effective until July 18, 1956. *Narcotics Control Act of 1956*, sec. 104; Public Law 728, 84th Congress; 26 USC 7607. There is thus substantial doubt that Mr. Finley could be the "authorized officer" to whom the warrant was directed (R. 11). In 1953, the Seventh Circuit came to the conclusion that narcotics agents "by implication" had the power to execute warrants. *United States* v. *Jones*; 204 F.2d 745, 754, certiorari denied 346 US 854. The Supreme Court has never decided, however, that the execution of judicial process may be relegated to any person whose job makes it convenient. The fact that a female deputy Marshal was asked to sign the return on the warrant (R. 12), may indicate Mr. Finley's evaluation of his own powers.

expression. It connotes a legal conclusion to be drawn from a statement of, or the existence of, facts." *United States* v. *Wroblewski*, 105 F.2d 444, 446.

Since the days of Chief Justice Marshall, it has been settled that a warrant must be based on a sworn statement of fact. *Ex Parte Burford*, 3 Cranch 448, 453. More recently, this Court has held that:

> "A search warrant[2] may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States*, 1 Cir., 284 F. 208; *Wagner* v. *United States*, 8 Cir., 8 F.2d 581) and would lead a man of prudence and caution to believe that the offense had been committed. (*Steele* v. *United States*, 267 US 498, 504, 45 S.Ct. 464, 69 L.Ed. 757.)" *Grau* v. *United States*, 287 US 124, 128.

The detailed affidavits needed to win Supreme Court approval may be seen in *Steele* v. *United States*, 267 US 498, 500, and in *Dumbra* v. *United States*, 268 US 435, 440, in which the opinion significantly points out that:

> "The statements of fact contained in the affidavit are based on affiant's personal knowledge of what he saw; it sets forth evidentiary facts which, in our opinion, establish probable cause . . ."

Relying on cases dealing with sufficiency of indictments, the Fifth Circuit's majority found it:

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[2] The Constitution suggests no difference between the form of affidavit required to obtain search and arrest warrants, since the Fourth Amendment is equally concerned with security of "persons, houses, papers, and effects." The cases emphasize that, "The Amendment protects the people against the seizure of their persons as well as against the search of their houses." *Wrightson* v. *United States*, 222 F.2d 556, 559; *Worthington* v. *United States*, 166 F.2d 557, 562; *Potts* v. *Rabb*, 141 F.2d 45, 46, footnote 1.

"... difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged than the language of the statute here used in the complaint" (R. 64).

As the dissenting judge easily recognized (R. 67), "... that holding is a non-sequitur." The indictment-sufficiency cases deal with the Sixth Amendment right "... to be informed of the nature and cause of the accusation ..." Under the terms of that Amendment, this is a right which "... the accused shall enjoy ..." In this case, we are dealing with the personal responsibility of the magistrate to be satisfied that probable cause exists for an arrest under the Fourth Amendment, not with the right of a defendant to know why he is being tried.

Mr. Finley's affidavit no more supports a finding of probable cause by the commissioner than an indictment affords any basis for a verdict that a defendant is guilty. Both the commissioner and the judge were supposed to have evidence before them to support their decisions; accusation is not the equivalent of proof at any stage of proceedings under our Constitution.

It is not as though the insufficiency of the affidavit in this case posed some new, original question—the problem presented here has been settled for years.

Mr. Justice Bradley, acting as Circuit Justice in 1877, made it clear that "... the magistrate ought to have before him the oath of the real accuser ..." to "... judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant." *In Re Rule of Court*, 3 Woods 502, Fed. Cas. No. 12,126.

The cases so clearly establish petitioner's point in this regard that relevant excerpts from reported opinions have been assembled as Appendix "A" to this brief.

The sound reason for the rule that the affidavit must state facts is that, "Under our system of government, the accuser is not entitled to be the judge." *United States* v. *Harnich*, 289 F. 256, 261. "The finding of the legal conclusion of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the judge to the accuser." *Veeder* v. *United States*, 252 F. 414, 418, certiorari denied 246 US 675. This Court has put it this way:

> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald* v. *United States*, 353 US 451, 455.

No "grave emergency" can be found in a case in which the arresting officer admits that, ". . . there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" (R. 22).

If a warrant may be issued on the basis of a bare allegation that a defendant has violated the law, unsupported by facts tending to prove the charge, there is no good reason to require warrants at all. The whole purpose of the Fourth Amendment is to protect citizens from the police through the "informed and deliberate determinations" of a "neutral and detached magistrate." *United States* v. *Lefkowitz*, 285 US 452, 464; *Johnson* v. *United States*, 333 US 10, 14.

This insurance against enthusiastic policemen means nothing if the affidavit in this case fills the bill. If the Commissioner is only required to place a formal imprimatur on someone else's evaluation of the evidence, we have returned to the days of writs of assistance, which placed "'. . . the liberty of every man in the hands of every petty officer.'" *Boyd* v. *United States*, 116 US 616, 625.

It is worth noting that the arresting officer testified that, "I had probable cause to believe that, yes" (R. 15). Al-

though the trial judge overruled a defense objection to the expression of this conclusion (R. 16), the best description of this comment is found in this Court's words: "The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did." *Director-General* v. *Kastenbaum*, 263 US 25, 28.

In this case, the U. S. Commissioner never had a chance to determine whether there was probable cause—or any cause—to arrest petitioner, since Mr. Finley gave the Commissioner no facts on which such a conclusion could be based. Indeed, in the state of this record, it may be concluded that the Commissioner simply abdicated from his duty, ". . . to reject a complaint and refuse a warrant of arrest unless satisfied that there is probable cause therefor." *United States* v. *Dolan*, 113 F. Supp. 757, 761.

C. The Commissioner Had No Jurisdiction to Issue a Warrant Because the Complaint Was Not Based on Personal Knowledge or Supported by Other Proof

Mr. Finley admitted that he never saw the appellant with any heroin hydrochloride (R. 16), or with any narcotics in his possession (R. 17). As a matter of fact, he conceded that he never saw petitioner violate any of the laws of the United States (R. 22).

This explains, of course, why Mr. Finley's affidavit stated no facts—Mr. Finley did not know any facts to state which would be relevant in establishing probable cause in the mind of the Commissioner. It also provides another basis for reversing this conviction, because a complaint which is not actually based on personal knowledge confers no jurisdiction on the Commissioner to issue a warrant. See *United States* v. *Longsdale*, 115 F. Supp. 489, in which the Court held an affidavit insufficient after a hearing revealed that

the complaining witness had no personal knowledge of the facts.

Clearly basing its decision on the Fourth Amendment, the Court of Appeals for the District of Columbia has said:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer." *Schencks* v. *United States*, 2 F.2d 185, 186.

Far from making any attempt to get affidavits from his informants or to subpoena them, Mr. Finley made no effort to learn whether they were available to appear before the Commissioner (R. 19). Having made his own finding of probable cause (R. 15), Mr. Finley did not take the Commissioner into his confidence by listing the names of any witnesses on the affidavit (R. 13). He said, "I swore to the complaint myself on the basis of their information" (R. 18).

Viewing a similar complaint made under similar circumstances, the District Court for the Northern District of New York said:

> "This lack of personal knowledge was admitted upon the hearing. The complaint, therefore, becomes nothing more than a statement of the commission of a crime,

based on hearsay. Although made upon the personal oath of the complainant, it is in reality a complaint based upon information and belief and nothing more. The positive averments of an official as to facts not within his personal knowledge may be enough to protect the commissioner but they should not be sufficient to confer jurisdiction, in violation of the constitution and the numerous decisions of the courts. The complaint must, therefore, be held insufficient." *King* v. *Gokey*, 32 F.2d 793, 795.

Discussing this question, the court below decided that a complaint is sufficient if it merely "purports" to be on the knowledge of the affiant (R. 64), citing *Rice* v. *Ames*, 180 US 371 and *United States* v. *Walker*, 197 F.2d 287, 289.

Where *Walker* indicates that a complaint which only appears to be based on personal knowledge is sufficient, it relies solely on *Rice* v. *Ames*. That opinion, in turn, is a foreign extradition case in which the Supreme Court expressly found it necessary to depart from constitutional standards established for criminal cases because:

"... we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings." (180 US at 375)

Extradition proceedings are *sui generis;* they are not criminal cases. See *Klein* v. *Mulligan*, 1 F. Supp. 635, 636, affirmed 50 F.2d 687, certiorari denied 284 US 665, and cases cited therein. The Federal Rules of Criminal Procedure do not apply to them. Rule 54(b)(5).

The Court below has thus decided that considerations peculiar to foreign extradition proceedings, which are based on the constitutional treaty power and in which eye-wit

nesses can seldom be produced, should control domestic criminal prosecutions in derogation of the Bill of Rights.

To decide that an affidavit for a warrant need only "purport" (R. 64) to be based on personal knowledge is to open the door to abuse of process. Applications for warrants are heard *ex parte*. Unless the constitutional affidavits must truthfully be based on personal knowledge which stands up later under cross-examination, anyone may obtain a warrant after recitation of an outright falsehood. Such a practice " . . . reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States*, 251 US 385, 392.

D. If Mr. Finley Did Have Any Personal Knowledge About Petitioner, the Court Should Ignore Such Information Because It Was Not Stated in the Complaint

In its brief opposing the petition for certiorari, the government argued (Br. 4-5) that:

> "In this case, Agent Finley had ample basis . . . for a sworn complaint that the petitioner possessed narcotic drugs."

Petitioner does not concede that personal knowledge of the commission of any crime can be read into Mr. Finley's admission that he never saw petitioner violate any of the laws of the United States (R. 22).

Nevertheless, even if Mr. Finley did have enough information to add up to probable cause, such information should not be considered in support of the arrest. The question here is not whether Mr. Finley possessed enough information to ask for a warrant; the question is whether the Commissioner was given enough information to issue one.

The Federal Rules of Criminal Procedure require that the complaint contain "the essential facts constituting the offense charged." (Rule 3) Then, "If it appears from the complaint that there is probable cause . . .", the warrant may issue. (Rule 4)

As the dissenting judge below observed (R. 70):

> "Thus, 'probable cause' must appear 'from the complaint' itself, and the 'essential facts' must be stated in the complaint. In the safeguarding of such fundamental human rights the rules wisely leave nothing to speculation nor to oral testimony as to what was before the commissioner."

Cases long antedating the present rules held that, "The Constitution means . . . that the grounds of issuance shall be disclosed at the time of issue" and that " . . . the affidavit must be self-sufficient, and cannot be bolstered up by oral testimony." *United States* v. *Casino*, 286 F. 976, 978; *Polido* v. *United States*, 55 F.2d 866, 868. See *United States* v. *Nichols*, 89 F. Supp. 953, 955, for a similar expression regarding affidavits for search warrants under Rule 41.

Mr. Finley's "information" does not really help the government's case. He said he heard that petitioner "planned to go to Chicago, Illinois, to bring back a large supply of heroin" (R. 18) and claimed that petitioner stated, after the arrest, " . . . that he had received the heroin in Chicago . . ." (R. 35). The statute (26 USC 4704) makes it an offense only to "purchase, sell, dispense or distribute narcotic drugs . . ." The indictment alleges purchase and possession of narcotics (R. 1). Possession is not an offense and is relevant only as a basis for the statutory presumptions, which are rebutted in this case by Mr. Finley's testimony regarding acquisition in Chicago. Thus none of the acts necessary to constitute an offense under the statute were proved, unless to "bring back" or to "receive" means to "purchase". Even so, the prosecution should fail because any purchase must have taken place in the Northern District of Illinois, not the Southern District of Texas. Questions of venue raise "deep issues of public policy" *United States* v. *Johnson*, 323 US 273, 276, which were adequately presented to the trial court by petitioner's motion for a "directed verdict" (R. 50). *United States* v. *Jones*, 174 F.2d 746, 748.

II.

By Waiving Preliminary Hearing, Petitioner Did Not Waive His Right to Have Illegally Obtained Evidence Excluded From the Record at His Trial.

Declining to decide whether the defects in the complaint rendered the warrant void (R. 62), the Fifth Circuit affirmed this conviction by concluding (R. 64):

> "... that the waiver by appellant of the preliminary examination constituted a waiver of any such defects, and that he will not be permitted to raise the issues by motion later."

There are many cogent reasons why this holding should be reversed.

A. The Doctrine of Waiver Cannot Apply Under the Particular Facts in the Case at Bar

The validity of this arrest should be decided without regard to any claim of "waiver" because petitioner was never offered—and thus could not have waived—a preliminary hearing as to the offense for which he now stands convicted.

The complaint on which preliminary hearing was waived charged that on January 26, 1956, petitioner received and concealed narcotic drugs with knowledge of unlawful importation, a violation of 21 USC 174 (Ex. 2, R. 11). The indictment on which the conviction is based charges that on a different day (the day of the arrest) he purchased narcotics not in or from the original stamped package, in violation of 26 USC 4704 (R. 1).

It is all very well to state, in the language of the Fifth Circuit (R. 64), that:

"... it is difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged than the language of the statute here used in the complaint."

The fact remains that the "language of the statute here used in the complaint" was not and is not the language of the statute on which this conviction is based.

A defendant will need extraordinary prescience if his actions in one case forever forfeit fundamental constitutional rights as to all offenses of which he may be accused in the future. Waiver is usually defined as "the intentional relinquishment of a known right." 92 CJS Waiver, p. 1041; 56 Am. Jur. Waiver, Sec. 2, p. 102; and cases cited therein. A defendant can hardly possess "known rights" as to a prosecution not yet commenced.

Recognizing that the basis for a man's decisions can change from case to case, the Fifth Circuit held twice in 1952 that the Fifth Amendment privilege against self-incrimination "... attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding." *Poretto* v. *United States*, 196 F.2d 392, 394; *Marcello* v. *United States*, 196 F.2d 437, 444-445.

Since the Fourth Amendment and the self-incrimination clause of the Fifth Amendment are designed to protect the same fundamental rights (*Boyd* v. *United States*, 116 US 616, 633), the same restrictions against waiver should apply to questions arising under each. Petitioner's tactics in a customs case, in which no indictment has yet been returned, should not rescue the government's internal revenue conviction.

B. U. S. Commissioners Have Neither the Power Nor the Ability to Decide the Questions Which the Fifth Circuit's Opinion Would Force Upon Them

Even aside from the particular facts in this record, petitioner argues that waiver of preliminary examination does not amount to consent to an arrest.

The federal practice of excluding evidence obtained illegally has been described as " . . . a judicially created rule of evidence . . . " (concurring opinion of Mr. Justice Black in *Wolf* v. *Colorado*, 228 US 25, 40) and this nation's judicial power is vested only in its courts (Art. III, Section 1, United States Constitution).

The very case which gave its name to the federal exclusionary rule makes it clear that enforcement of the Fourth Amendment is the peculiar province of the judiciary:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 US 383, 394.

The Fifth Circuit itself has recognized that:

> "When . . . officers of the federal government break the Federal Constitution to get at the truth, the federal courts refuse to hear it." *Foley* v. *United States*, 64 F. 2d 1, 4.

The meaning and importance of the legion of federal cases dealing with the *Weeks* doctrine is that our constitutional rights can be effectively protected only by the courts. See *Beisel*, Control Over Illegal Enforcement of the Criminal Law: The Role of the Supreme Court, Vol. XXXIV,

No. 4, and Vol. XXXV, No. 1, Boston University Law Review.

Implicit in the Fifth Circuit's opinion is the concept that the Commissioner could have taken some conclusive action had the arrest been challenged before him. If the Commissioner's decision is so important that it binds either the prosecution or the defense, the responsibility of the judiciary for defense of the Constitution (described as an "almost sacred" duty by Judge Rives below, R. 66) is subordinated to the best guess of "inferior officers" (*Go-Bart Importing Co.* v. *United States*, 282 US 344, 352) who "... are not and do not hold United States Courts." *In Re Perkins*, 100 F. 950, 954. See *Todd* v. *United States*, 158 US 278, 283; *United States* v. *Berry*, 4 F. 779, 780; *Ex Parte Perkins*, 29 F. 900, 909-910; *In Re Film, Etc., of Dempsey-Tunney Fight*, 22 F.2d 837, 839.

What would have happened if the petitioner had demanded a preliminary hearing? He would either have been bound over to the grand jury (as he was without the hearing) or he would have been discharged from custody.

If bound over to the grand jury, and if indicted, petitioner should still have filed a motion to suppress evidence in the District Court, under Rule 41(e) of the Federal Rules of Criminal Procedure. He would have gained nothing by demanding the preliminary hearing.

If discharged from custody by the Commissioner, petitioner could nevertheless have been re-arrested or indicted, since the Commissioner's decision is not *res judicata*. *Ex Parte Milburn*, 9 Pet. 704, 710; *Morse* v. *United States*, 267 US 80, 84-85; *United States* v. *Fogel*, 22 F.2d 823, 825; *Burrall* v. *Johnson*, 53 Supp. 126, 129, affirmed 146 F.2d 230, certiorari denied 325 US 887. No ruling which a Commissioner might make in petitioner's favor would protect him

from further prosecution based on the same evidence. *Collins* v. *Loisel*, 262 US 426, 429.

This Court makes it clear that:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal cases as well as in civil cases by the failure to make timely assertion of the right *before a tribunal having jurisdiction to determine it.*" *Yakus* v. *United States*, 321 US 414, 444. (Emphasis added.)

That is exactly the point in this case. The Commissioner did not have jurisdiction to "determine"—or end, finally—the matter under consideration. "The sole express authority for a pre-trial suppression of evidence by any court other than a trial court is found in Rule 41e." *United States* v. *Klapholz*, 230 F.2d 494, 496.

The problem may best be summed up in the words of the dissenting judge below (R. 77):

> "No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client when charged with a different offense to object to the legality of his original arrest and the search that followed."

Before suggesting that federal judges should surrender to United States Commissioners their responsibility for enforcement of the Fourth Amendment, it would be well to examine the Commissioners' qualifications to decide such questions.

The latest authoritative information about these officials seems to be the report of the Committee on United States Commissioners to the Judicial Conference of Senior Circuit Judges, dated June 28, 1943, filed in the Administrative Office of the United States Courts.

This report states (p. 7) that, " . . . of some 1,080 commissioners about one-half are laymen." The very fact that the case at bar has reached the Supreme Court demonstrates that constitutional rights are at least subtle enough that their enforcement should not depend on a 50-50 chance of reaching a lawyer. (See the arguments of counsel on the dangers of leaving fundamental rights to the mercy of inferior tribunals in *Ex Parte Bollman* and *Ex Parte Swarthout*, 4 Cranch 75, 89-90.)

There are cases holding that denial of the right to counsel at a preliminary hearing does not infect a subsequent trial with reversible error. *Burrall* v. *Johnson*, *supra*, 53 F. Supp. 126, affirmed 146 F.2d 230, certiorari denied, 325 US 887. The *Weeks* doctrine is in sad straits if a man is bound by failure to raise difficult legal objections, without a lawyer's assistance, at a hearing before an official who may also be a layman.

The Fifth Circuit bases (R. 62-63) its theory of waiver on *United States* v. *Walker*, 197 F.2d 287, certiorari denied 344 US 877, which holds (197 F.2d at 289) that:

> " . . . waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence."

This Court's denial of certiorari does not amount to sanction of *Walker*, since denial of a writ of certiorari imports no expression of opinion on the merits of the case. *Brown* v. *Allen*, 344 US 443, 489-497, and cases cited therein. Petitioner contends, quite simply, that the Second Circuit was wrong in Walker, for the reasons stated in this brief and for the reasons stated by the dissenting judge in the Court of Appeals (R. 73-76).

C. Petitioner Called the Trial Court's Attention to His Illegal Arrest by Following the Precise Method Provided by the Federal Rules of Criminal Procedure

It becomes almost ludicrous to suggest that petitioner actually waived any objection to his illegal arrest, in the face of the recognized presumption that constitutional rights have not been waived. *Hodges* v. *Easton*, 106 US 408, 412; *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 US 292, 306; *Aetna Ins. Co.* v. *Kennedy*, 301 US 389, 394; *Johnson* v. *Zerbst*, 304 US 458, 464; *Glasser* v. *United States*, 315 US 60, 70; *Smith* v. *United States*, 337 US 137, 150; *Emspak* v. *United States*, 349 US 190, 198.

In bringing petitioner's constitutional objections before the trial court, his lawyers followed the customary procedure approved in *Weeks* v. *United States*, 232 US 383, and now embodied in Rule 41(e) of the Federal Rules of Criminal Procedure. They moved, before trial, to suppress the evidence (R. 2).

Rule 41(e) particularly provides for a motion to suppress evidence on the ground that "there was not probable cause for believing the existence of the grounds on which the warrant was issued." In its brief in opposition to the petition for certiorari in this case the government said:

> "We do not argue, however, that, by waiving preliminary hearing, a defendant so far accepts the validity of the arrest that he is precluded from asserting that the arrest was without sufficient probable cause to meet Fourth Amendment requirements governing a search incident to an arrest" (Br. 4).

As demonstrated in Section I of the argument portion of this brief, Mr. Finley's affidavit did not establish probable

cause because it did not state evidentiary facts and because it was not based on personal knowledge.

"Waiver is the intentional abandonment of a known right, not a trick to catch one napping." *McKee* v. *McGhee*, 114 S.C. 183, 103 SE 508; *National Life & Acc. Ins. Co.* v. *Varner*, 171 Tenn. 95, 100 SW 2d 662, 664.

Considering:

(1) the presumption against waiver of constitutional rights,

(2) the established practice during the 44 years since *Weeks*,

(3) the specific provisions of Rule 41(e),

(4) the fact that the hearing which was waived did not pertain to the case now on appeal, and

(5) the fact that the Commissioner had no jurisdiction to give petitioner any final relief, the opinion below creates only a "trick to catch one napping."

This clearly violates the requirement that the Federal Rules of Criminal Procedure, " . . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2). If "adjudication on the merits" is the "motivating policy" of the present rules (*United States* v. *Claus*, 5 FRD 278, 280), the practice demanded by the Court of Appeals falls far short of the goal.

It is important to note that petitioner's case at the pretrial hearing was based entirely on Mr. Finley's testimony (R. 15-26). Mr. Finley was an essential, necessary government witness at the trial and was called by the prosecution as such (R. 30). There was never any controversy about the facts; the case which petitioner made out at the pre-

trial hearing was the case on which the government relied at the trial.

Even a motion to suppress evidence is ordinarily necessary only to satisfy the rule of convenience that, " . . . courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained." *Gouled* v. *United States*, 255 US 298, 312; see *Weeks* v. *United States*, 232 US 383, 396. The pre-trial motion and hearing have been held unnecessary when there is no factual conflict to be settled; this Court has reversed convictions based on evidence seized illegally:

(1) when the motion to suppress was not filed until after the jury was impanelled (*Amos* v. *United States*, 255 US 313, 316),

(2) when objection was made at the time of introduction of the tainted proof after a pre-trial motion to suppress had been overruled (*Gouled* v. *United States*, *supra*, 255 US 298, 312), and

(3) when the defense made no pre-trial motion and first objected to the evidence at the time of its introduction (*Agnello* v. *United States*, 269 US 20, 34).

The gist of these decisions is that:

> "Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the 4th Amendment, there is no reason why one whose rights have been so violated, and who is sought to be incriminated by evidence so obtained, may not invoke protection of the 5th Amendment immediately and without any application for the return of the thing seized. 'A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.'" *Agnello* v. *United States*, *supra*, 269 US 20, 34.

In *United States* v. *Asendio*, 171 F.2d 122, 125, the Third Circuit reversed a conviction when the illegal search was first questioned in a motion for new trial. Judge Holtzoff (Secretary to the Supreme Court's Advisory Committee on the Rules of Criminal Procedure) recently held in *United States* v. *Watson*, 146 F. Supp. 258, 259, that a motion to suppress evidence was timely when first presented at a third trial for the same offense.

In the light of *Amos*, *Gouled*, *Agnello*, *Asendio* and *Watson*, *supra*, petitioner earnestly submits that his vigorous objections cannot be tortured into waiver.

D. The Practical Effect of the Opinion Below Is to Deprive Most Defendants of the Opportunity for Full Exercise of Constitutional Rights

The realities of criminal practice neither comprehend nor permit the procedure which will be forced upon the federal courts if the opinion below is affirmed.

If *McNabb* v. *United States*, 318 US 332, did not convince federal agents that their prisoners have a right to an immediate hearing, *Mallory* v. *United States*, 354 US 449, should certainly put the point across. The beneficent effect of these decisions will be destroyed if a defendant may demand a prompt hearing only when prepared to present his case immediately in final form.

"Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 US 912, 918. So does competent advice of counsel. Sufficient time to prepare a case is an element of the constitutional right to Assistance of Counsel. United States Constitution, Amendment VI; *Powell* v. *Alabama*, 287 US 45, 71. Few cases are ready for trial in time for a hearing held the day after the arrest, as in this case (R. 9). Few able criminal lawyers are available to try cases on a moment's notice.

Although the Rules of Criminal Procedure require the Commissioner to give a prisoner "reasonable time and opportunity to consult counsel" (Rule 5b), it is not enough to suggest that a client who is entitled to bail should be bound by the strategy of a lawyer selected from jail.

Impairment of the Eighth Amendment right to reasonable bail can destroy other constitutional rights, including the right to make an intelligent selection of counsel. *Kraft* v. *United States*, 238 F.2d 794, 799. A prisoner who needs counsel to save complex legal objections before bail is set, although he can often retain counsel of his own choice only after release on bail, is on a hopeless merry-go-round.

The fact that petitioner had a lawyer at his side before the Commissioner (R. 9) only proves that these problems are real. The lawyer who appeared at the preliminary hearing did not appear thereafter. Different attorneys, chosen after time for reflection and preparation, represented petitioner at the hearing on the motion to suppress (R. 4), on trial (R. 28) and on appeal.

There are other serious implications in the opinion below.

If issues may be raised on trial only when raised in the preliminary hearing, it will be important to determine just what objections were brought to the Commissioner's attention. Official court reporters are required (28 USC 753b) only to attend, "at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges." Counsel for petitioner knows of no district in which official reporters are required to attend preliminary examinations.

Under these circumstances, trial and appellate courts will be faced with an unending succession of cases in which the chief issue will be a battle between witnesses seeking to establish whether or not particular objections were actually

raised before Commissioners. It takes little imagination to discern that this will be an unrewarding, time-consuming, and often futile task.

Another problem is that any practice which requires a defendant to submit to a "dry run" in advance of trial may well offend the constitutional prohibition against double jeopardy. United States Constitution, Amendment V. See *Ball* v. *United States*, 163 US 662, 669, holding that "The prohibition is not against being twice punished, but against being twice put in jeopardy . . ."

Proceedings at which a defendant's rights may be finally established certainly approach anyone's concept of jeopardy.

CONCLUSION

"An arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz*, 285 US 452, 467.

It is apparent that the warrant in this case was used only as an "investigative technique," as Mr. Finley admitted (R. 22). It was not, and was never intended to be, the preliminary step in an honest prosecution for an offense committed prior to the time the warrant was obtained, as is demonstrated by the fact that petitioner has not to this day been indicted for the offense alleged in Mr. Finley's complaint.

"Strictly speaking, a complaint . . . is an accusation . . . recognized as one of the methods of commencing a criminal prosecution in the federal courts." *Cyclopedia of Federal Procedure*, 3rd Ed., 1952, Vol. 11, Sec. 40.04. "The arrest of the offender, followed by and coupled with a preliminary hearing, are the inceptive acts and the beginning of the exercise of criminal jurisdiction and procedure . . ." Longs-

dorf, *The Beginnings and Background of Federal Criminal Procedure*, Barron and Holtzoff, *Federal Practice and Procedure*, Rules Edition, 1951, Vol. 4, p. 16. "Arrest for trial is a proceeding which belongs to the judicial, not to the executive branch of the government . . ." The Power to Cause an Arrest, 1 Op. Atty. Gen. 229, Sept. 8, 1818.

In other words, a warrant is not a weapon to be loaded with blank ammunition for use in a legal ambush. It is a court order, issued to a named, authorized public official, commanding him to find a particular person who is to be brought before the Court to answer for a particular offense. No matter how much policemen would enjoy the use of judicial process as an "investigative technique" (R. 22), our Constitution requires wary vigilance in consideration of a search based on an arrest made when " . . . there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" (R. 22).

In 1948, Judge McAllister, of the Court of Appeals for the Sixth Circuit, pointed out the dangers inherent in proceedings such as these, stating, in *Worthington* v. *United States*, 166 F.2d 557, at 568:

> "We have heard enough in these last years, throughout the world, of the knock on the door in the nighttime, the arrest, the ransacking search, and the prison cell, to take warning. The constitutional rights of everyone are immediately imperiled when the rights of even the outcast, the disdained and the powerless, are trampled over with impunity. Violation of the safeguards, guaranteed by the Bill of Rights, is not to be trifled with, or lightly considered, no matter who the victim be. Such abuse must be struck down, without palliation, in its beginning."

For the reasons stated, this Court should reverse this conviction. Since the only proof of the offense alleged is evidence which was seized illegally, there is no reason for further proceedings. This Court should direct the entry of a judgment of acquittal as permitted by Section 2106 of Title 28, United States Code.

Respectfully submitted,

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APPENDIX "A"

(The following quotations are from opinions which make it clear that the Fourth Amendment is satisfied by nothing less than affidavits which set forth evidentiary facts actually based upon personal knowledge.)

In 1922, the First Circuit Court of Appeals examined an affidavit just like Mr. Finley's and observed:

> "The fact that Lordan's affidavit was not in form on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, not his conclusions from the facts, should have been before the commissioner." *Giles* v. *United States*, 284 F. 208, 214.

Quashing a search warrant because of an insufficient affidavit, the Seventh Circuit Court of Appeals stated:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs or surmises—but facts, which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts, which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right." *Veeder* v. *United States*, 252 F. 414, 418, certiorari denied 246 US 675.

The Sixth Circuit, in 1927, said:

> "The search warrant now involved was issued upon an affidavit, the sufficiency of which must be tested by its statements of fact rather than by its conclusions.

> We therefore disregard the allegation made in terms that the premises were being used for business purposes and for the sale of intoxicating liquor, and look only to the circumstances expressly stated." *Kasprowicz* v. *United States*, 20 F.2d 506, 507.

The District Court for the Eastern District of Louisiana put it this way in 1928:

> "The facts sworn to in the affidavit, and not the conclusions of the affiant; nor the evidence disclosed by the search, must determine whether the rights guaranteed Cangemi by the Fourth and Fifth Amendments of the Constitution were invaded under this particular warrant. *United States* v. *A Certain Distillery*, 24 F.2d 557, 558.

The Fourth Circuit, in 1937, stated flatly that:

> "The warrant under which the officers acted, not being supported by affidavit showing facts constituting probable cause for the belief that liquor was possessed on the premises in violation of law, did not meet the requirements of the Fourth Amendment to the Constitution." *Sutherland* v. *United States*, 92 F.2d 305, 307.

Reviewing a customs case in 1938, the Second Circuit took one look at an affidavit which merely tracked the statute, as did Mr. Finley's, and said:

> "Relying upon the Fourth Amendment to the Constitution, the appellant contends that the search warrant was illegal because Pike's affidavit showed no facts upon which to base a finding of probable cause. Such generalities as appear in his affidavit were clearly no justification for issuance of the warrant . . . " *In Re No. 32 E. 67th St.*, 96 F.2d 153, 155.

The conscientious reasoning of Judge George A. Welsh came up with this answer in 1940:

> "Was the search and seizure invalid? That is to say, was the supporting warrant itself supported by sworn

facts competent to be submitted to a jury, as reasonably affording probable cause for believing that seditious or subversive matter was to be found at the headquarters of the Communist Party at 250 S. Broad Street? This is the standard by which the validity of the search and seizure is to be tested." *Reeve* v. *Howe*, 33 F. Supp. 619, 622.

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief was mailed to the Solicitor General, Department of Justice, Washington 25, D. C., this 11th day of February, 1958, air mail postage prepaid.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 549

VETO GIORDENELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government contends that waiver of preliminary hearing constitutes an admission against interest (Govt. Br. 12, 29) and that this Court should ignore the constitutional and historical differences between an indictment and an affidavit for a warrant (Govt. Br. 29-35). These arguments are fully discussed in the dissenting opinion below and in petitioner's brief on the merits. This reply

brief is devoted only to the government's new thought—that an arrest by a Federal officer, executing an invalid Federal warrant, may somehow be condoned by a State statute purporting to grant State officers powers to search on suspicion.

I.

WITHOUT A WARRANT, THE ARREST IN THIS CASE WOULD BE INVALID UNDER STATE LAW

The loose standards established by Section 15, Article 725-b, *Texas Penal Code*, authorizing searches by peace officers who "have reason to believe and do believe" that narcotics might be discovered, clearly violate the Fourth Amendment. This statute is constitutionally palatable only because the Texas Court of Criminal Appeals requires, ". . . that the officer have some information that the accused was violating the law, plus some act on the part of an accused which would bolster and support such belief." *Thomas v. State*, 288 S.W. 2d 791, 793.

This "act on the part of an accused" must be of an incriminating nature in itself. It must, under State law, be more than mere association with a wanted "police character" coupled with nervous behavior. *Harper v. State*, 284 S.W. 2d 362. A defendant in Texas must do something more than carry a brown paper bag in the presence of a person being arrested for possession of marijuana. *Giacona v. State*, 298 S.W. 2d 587.

These decisions rest upon the conclusion of the Court of Criminal Appeals that any other result would violate both the State and Federal Constitutions. *Giacona v. State*, *supra*, 298 S.W. 2d 587, 588-589. No act of this petitioner,

while under observation by Mr. Finley, would provide any greater basis for an arrest in Texas than the evidence in *Thomas*, *Harper* and *Giacona*, *supra*.

II.

IF THE STATE STATUTE WOULD AUTHORIZE AN ARREST WITHOUT WARRANT UNDER THE FACTS IN THIS CASE, THAT STATE STATUTE WOULD VIOLATE THE FEDERAL CONSTITUTION

If a State statute affirmatively sanctions an arrest which violates the Fourth Amendment, that statute is invalid under the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28.

Nothing in *Brinegar v. United States*, 338 U.S. 160, suggests that personal knowledge of some incriminating fact is not a necessary ingredient of the probable cause needed to support an arrest without warrant under Federal law. That opinion repeatedly emphasizes that the arresting officers did have personal knowledge of Brinegar's activities (338 U.S. at 166, 168, 169 and 172). It requires "facts and circumstances" which are *both* ". . . within their knowledge and of which they had reasonably trustworthy information . . ." 338 U.S. at 175-176.

In this case, the Federal agent admitted that he never saw petitioner with any heroin hydrochloride (R. 16), with narcotics (R. 17), or violating any law of the United States (R. 22). On the day of the arrest, Mr. Finley saw only that petitioner was accompanied by a "police character" and carried a brown paper bag. Certainly no one would suggest that these facts alone could justify an arrest compatible with the Fourth Amendment.

It was only Mr. Finley's "information" which might make these facts significant or suspicious. Under Federal law, that "information" should have been presented to and evaluated by a magistrate, not by Mr. Finley, if a lawful arrest was to take place.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14.

III.

REGARDLESS OF THE POWERS WHICH A STATE LEGISLATURE MAY WISH TO GIVE STATE OFFICERS, FEDERAL AGENTS SEEKING EVIDENCE TO BE OFFERED IN FEDERAL COURTS ARE LIMITED TO THE POWERS WHICH CONGRESS WISHES THEM TO HAVE.

The government contends that State statutes can give Federal officers *carte blanche* to arrest in accordance with State practice, citing *United States v. Di Re*, 332 U.S. 581, and *Johnson v. United States, supra*, 333 U.S. 10 (Govt. Br. 15).

Only two terms ago, this Court made it clear that:

> "Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules." *Rea v. United States*, 350 U.S. 214, 217.

The government's argument requires a bold and questionable departure from *Di Re* and *Johnson, supra.* Those cases dealt with the admissibility, in Federal courts, of evidence seized during arrests by State officers. In *Di Re,* this Court referred to ". . . the arresting officer, a state officer . . ." 332 U.S. 581, 588. In *Johnson,* Lt. Belland of the Spokane, Wash., police department, was the key figure in the arrest. 333 U.S. at 12.

This Court has not yet decided that the States may enlarge the arrest powers of Federal officers when Congress has not seen fit to do so. *Rea v. United States, supra,* establishes that the States have no such power.

IV.

IN THE DISTRICT COURT THE GOVERNMENT CHOSE TO STAND OR FALL ON THE VALIDITY OF THE WARRANT; THE CONVICTION CANNOT BE SUPPORTED, AND THE ACCUSED CANNOT BE SUBJECTED TO REPEATED JEOPARDY, ON THE STRENGTH OF ISSUES REJECTED BELOW.

Even today, relying on a new theory involving arrests without warrant under State law, the government tells the Court that this arrest was made, ". . . on the basis of the warrant . . ." (Govt. Br. 5). On trial, the U. S. Attorney convinced the District Judge that he should take *judicial notice* that this arrest was based, ". . . on a complaint and warrant." (R. 37).

If the government's new theory is correct, the petitioner should at least be entitled to a new trial. "A Court . . . very rarely can be justified in giving judgment upon

grounds that the record was not intended to present." *Casey v. United States*, 276 U.S. 413, 419. Had the government even suggested on trial that Mr. Finley had some right to arrest without warrant, the defense could have challenged whether he actually had an honest belief based on credible information. *Scher v. United States*, 305 U.S. 251, 254; *Roviaro v. United States*, 353 U.S. 53, 61.

Even if the government's new theory would have had merit in the District Court, the petitioner is entitled to more than a new trial. He is entitled to a judgment of acquittal.

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." United States Constitution, Amendment V. Just this term, this Court recognized that the State, ". . . with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense . . ." *Green v. United States*, __ U.S. __, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 223.

This prohibition should include new legal theories which the prosecution rejected below by choice. The government should be estopped from resuscitating, in the Supreme Court, arguments which it consciously avoided on trial.

Even in civil cases, this Court recognizes that a party may not repudiate a position deliberately selected on trial. *Brown v. Gurney*, 201 U.S. 184, 190. Certainly no defendant in a criminal case would be allowed to choose a defense for the first time in an appellate court.

Considering:

(a) the double jeopardy clause of the Fifth Amendment, and,

(b) the government's demand, on trial, that this arrest be considered as an arrest based on a warrant (R. 37),

this Court should hold that the government is now precluded from claiming that this arrest could be sustained without a warrant, should reverse this conviction, and should enter a judgment of acquittal.

Respectfully submitted,

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No. 549

In the Supreme Court of the United States

October Term, 1957

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals is reported at 241 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered January 31, 1957 (R. 78), and a petition for rehearing was denied on May 17, 1957 (R. 79). The petition for a writ of certiorari was filed June 5, 1957, and granted on October 14, 1957 (R. 80). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there was a valid search incident to a valid arrest.

STATUTE AND RULES INVOLVED

Sections 14 and 15 of Article 725–b of the Texas Penal Code (Vernon 1948), provided in pertinent part:

> SEC. 14. All narcotic drugs, as herein defined, manufactured, sold, or had in possession contrary to any provision hereof, shall be, and the same are declared to be contraband, and shall be subject to seizure and confiscation by any officer or employee of the Department of Public Safety or by any peace officer who is authorized to and charged with the duty of enforcing the provisions of this Act.
>
> SEC. 15. Officers and employees of the Department of Public Safety, and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall have power and authority, without warrant, to enter and examine any buildings, vessels, cars, conveyances, vehicles, or other structures or places, when they have reason to believe and do believe that any or either of same contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act, or that the receptacle containing the same is falsely labeled, except when any such building, vessel, or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as hereinbelow provided.
>
> Said officers and employees of the Department of Public Safety and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall further have power and authority, without warrant, to open and examine any box, parcel, barrel, package, or receptacle in the possession

of any person which they have reason to believe, and do believe contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act and that the receptacle containing same is falsely labeled.

Rule 3, Federal Rules of Criminal Procedure, provides in part:

> The complaint is a written statement of the essential facts constituting the offense charged. * * *

Rule 4 (a), Federal Rules of Criminal Procedure, provides in part:

> (a) *Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *

Rule 5 (c), Federal Rules of Criminal Procedure, provides in part:

> (c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has commit-

> ted it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. * * *

Rule 7 (c), Federal Rules of Criminal Procedure, provides in part:

> (c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. * * *

STATEMENT

Having waived jury trial (R. 29–30), petitioner was found guilty by the United States District Court for the Southern District of Texas of unlawfully possessing heroin (R. 1, 29, 51). He admitted one previous conviction for violation of the narcotics laws, and was sentenced to eight years imprisonment and a $25 fine (R. 53–54). On appeal, the Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting.

The sole issue in this case is the validity of the search of petitioner's person at the time of his arrest. The evidence on this issue may be summarized as follows:

On January 26, 1956, William T. Finley, an enforcement agent for the Federal Bureau of Narcotics, obtained a warrant for the arrest of petitioner from the United States Commissioner in Houston, Texas (R. 8–9, 11–12). The warrant was based on a complaint sworn to by Finley stating, in the words of the

statute, that petitioner, on January 26, 1956, did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride, with knowledge of unlawful importation, in violation of 21 U. S. C. 174 (R. 13). At about 8:00 p. m. on the following day, agent Finley and officer Shelton, a member of the Houston police department, arrested petitioner, on the basis of the warrant, as he emerged from a garage located in a residential area in Houston (R. 19, 31–32, 38, 43–44). The agents took a brown paper bag carried by petitioner and containing 5 ounces of heroin hydrochloride from him at the time of the arrest (R. 26, 33–35, 48–49). Agent Finley warned petitioner of his right to remain silent at the time of arrest (R. 35). Thereafter, petitioner voluntarily admitted purchasing the heroin in Chicago, adulterating it, and transporting it to Houston (R. 35–36). The indictment upon which petitioner was tried was based on the possession of this heroin (R. 1).

Petitioner was taken before a United States Commissioner the following day. He appeared with counsel, waived preliminary examination, and was arraigned on the original complaint. Petitioner did not question the validity of the warrant of arrest at that time (R. 9).

On February 29, 1956, petitioner moved to suppress the evidence obtained by Agent Finley at the time of the arrest (R. 2–3). He contended that the warrant of arrest was void and that the search incident to the arrest was therefore illegal. Petitioner's line of questioning at the hearing on the motion

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indicated that the ground of the motion was that Agent Finley did not have firsthand knowledge regarding an offense by petitioner at the time the warrant was obtained (R. 15–18). Petitioner also attempted to show that the warrant, issued January 26, 1956, was used only as an excuse to conduct a search (R. 21–22).

It was shown that Agent Finley had kept petitioner under surveillance for about one month prior to the arrest. He had information, not from paid informers (R. 19), that petitioner planned to go to Chicago and return with a large supply of heroin. Petitioner made a trip, and Finley observed his return in an automobile with Illinois license plates. Furthermore, Finley had information from other law enforcement officers that the trip had been successful (R. 18, 24, 31, 34, 45). After obtaining the warrant on January 26, Finley did not see petitioner until about 6:00 p. m. on January 27, when petitioner returned to his home (R. 21). When petitioner left his home a few minutes later he was accompanied by a "well-known police character." Petitioner drove off in his car, followed "bumper-to-bumper" in a second car by this person known to the police (R. 47). Finley and Shelton followed them, instead of arresting petitioner immediately (R. 21, 24, 47). The two cars which were being followed were driven to Lathrop Avenue in Houston where both were parked. Petitioner conferred with the other man for a few minutes. He then drove to Brownsville Street where he turned right, parked, and entered a residence (R. 24, 31, 47–48). The other man followed petitioner to

Brownsville Street, turned left one block, parked, and waited (R. 48). Some thirty minutes later, petitioner emerged from the house, went into the garage for a few seconds, and then started toward his car (R. 24, 31). As Finley and Shelton moved to intercept petitioner, they could see that he was carrying a brown paper sack or envelope in his hand (R. 33, 44). When petitioner reached the yard gateway, Finley made the arrest (R. 25). The agent testified that he had not obtained a warrant just to have an excuse to search (R. 23).

The District Court, without stating the ground for the ruling, denied the motion to suppress (R. 28).

In affirming, the majority of the Court of Appeals held that when petitioner, who was then represented by counsel, waived preliminary hearing after his arrest, he waived his right to contest the validity of the arrest and, also, of the search incident to the arrest (R. 63–64). The majority also expressed the view that the warrant of arrest was valid (R. 64–65).

SUMMARY OF ARGUMENT

This case involves a search only of the person incident to an arrest. Therefore, if the arrest was lawful or is not now subject to challenge, the search was also lawful, as this Court has consistently held. It is the government's position that this arrest was legal, irrespective of the validity of the warrant, under Texas narcotics law. Resolution of this issue depends upon an analysis of State law which we discuss in Point I, *infra*. We further contend that petitioner waived the alleged defect in the warrant of arrest by waiving a

preliminary hearing. See Point II. On either basis, the motion to suppress was properly denied.

I

Possession of an insufficient warrant does not render illegal an arrest which could lawfully be made without it. Room remains to show that the arrest was otherwise valid, and we show here that the arrest was valid, apart from the warrant, under State law. (Although we did not urge this question of State law below and the Court of Appeals for the Fifth Circuit has never passed on this issue, a respondent may support the judgment of the lower court on any proper ground.)

In the absence of an applicable federal statute, the law of the state where an arrest without warrant is made determines its validity. *United States* v. *Di Re,* 332 U. S. 581, 589. Texas law authorizes arrests without warrant in narcotics cases where probable cause exists to believe that narcotics violations have been committed. The language of the statute speaks of searches of the person without warrant, based on probable cause, without making reference to arrests, but the Texas courts have construed the statute to authorize arrests without warrant based on probable cause.

In this case, it is immaterial whether the federal standard or the Texas standard of probable cause is applied. Under federal law, probable cause exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information, even though incompetent as evi-

dence, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *United States,* 338 U. S. 160, 175–176. In Texas, probable cause is defined as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. This has been construed to mean that the arresting officer must have some information that the defendant was violating the law, plus some act on the part of the defendant which bolsters and supports such belief. *Thomas* v. *State,* 288 S. W. 2d 791, 792–793.

At the time of this arrest, the officers had information from other law enforcement officials that petitioner was in Houston, Texas, with a large supply of narcotics which he had obtained in Chicago, Illinois, and the officers had obtained a warrant of arrest. Agent Finley had observed petitioner's return to Houston in an automobile bearing Illinois license plates. Just prior to the arrest, the officers saw petitioner take a trip in Houston with a well-known police character. Petitioner behaved as though he did not wish to be seen with this person nor seen near a certain house in Houston. When petitioner emerged from the garage on these premises, he was carrying a brown paper bag which the agents reasonably concluded probably contained narcotics which petitioner intended to deliver to his companion. They had probable cause to arrest petitioner then and there, and did so. On this basis, the arrest was authorized

and the search its lawful incident. The fact that the arrest could have been made earlier did not render it invalid. *Scher* v. *United States,* 305 U. S. 251.

II

Moreover, we believe petitioner waived his right to challenge the validity of the warrant of arrest by waiving preliminary hearing.

The question of what grounds for challenging an arrest remain open to a defendant who, with the advice of counsel, waives a preliminary hearing after that arrest, is one which has not been fully explored by the courts. Clearly, by waiving a preliminary hearing, a defendant does waive the right to assert that he cannot thereafter legally be held in custody, *United States* v. *Walker,* 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877. He would thereby waive any question of identity, and he would waive any technical irregularity in the complaint or warrant, especially one appearing on the face of the complaint or warrant. *United States* v. *Ruroede,* 220 Fed. 210, 213–214 (S. D. N. Y.). This waiver would encompass such questions as relate to identity, misspelled names, and incomplete designation. The precise issue raised by this case is whether waiver of the preliminary hearing also waives questions relating to the validity of the warrant issued prior to the arrest, where the ground upon which the warrant is challenged is that the complainant, who alleged personal knowledge of the facts which gave rise to probable cause, lacked such personal knowledge. We believe that, under all the facts and circumstances of this case, this alleged defect is also waived by a waiver of a preliminary hearing.

In our view, the issue of whether probable cause exists to continue the person arrested under detention—the issue which would be raised at a preliminary hearing under Rule 5 (c) of the Federal Rules of Criminal Procedure—is, in the overwhelming majority of cases, inextricably involved in the question of whether probable cause existed to justify issuance of the warrant in the first instance. Therefore, it is not unreasonable, and makes for an orderly and expeditious disposition of this issue, to hold that the waiver of preliminary hearing waives all defects of a technical nature relating to the manner in which the accused has been brought before the Commissioner.

We note that the basis for challenge here—that the complaint alleged that it was made on personal knowledge, when in fact, it was based in part on reliable information—is one which, although not appearing on the face of the complaint, goes to the manner of arrest itself rather than to the seizure of the bag of heroin which was incident to that arrest. Thus, we are not faced with the question whether a waiver of preliminary hearing waives questions other than those relating to an arrest itself—for example, such questions as whether the search which followed the arrest went beyond permissible bounds. We urge merely that where, as here, the alleged defect goes to the arrest as such, rather than to collateral matters such as the extent of a search, the waiver of a preliminary hearing waives standing to challenge the validity of the very arrest which brought the accused before the Commissioner for that preliminary hearing. By waiving preliminary hearing, petitioner in

effect admitted through counsel that the complainant did have sufficient basis to arrest him. Petitioner should be held to that position and should not be allowed now to assert that he was illegally taken into custody.

III

Petitioner, having waived preliminary hearing, also waived, for the reasons set forth in Point II, the objection which he now presses that the complaint is insufficient on its face. But, in any event, the complaint adequately states, in the terms of the statute, that petitioner received and concealed heroin hydrochloride, a narcotic drug, with knowledge of its unlawful importation. Since an indictment in the words of this statute is sufficient, a complaint in the same form should also be sufficient to withstand the claim that it fails sufficiently to allege the essential facts.

Under Rules 3 and 7 (c), F. R. Crim. P., both complaints and indictments or informations need set forth only "the essential facts constituting the offense charged." Both rules are concerned with steps in the initiation of prosecution, and there is no reason to suppose that the quoted phraseology is to be given different content in each rule. The allegation of the minimum facts of the offense in an indictment is sufficient; the allegation of the same facts in a complaint should also suffice.

Rule 7 (c), *supra*, does not embody the so-called "short form" of indictment used in some jurisdictions; but a short statement of the necessary facts is

enough. Since there is no indication of any intent to change the meaning of the term "essential facts" when it was used in Rule 3, *supra,* it follows that a short statement of the necessary facts in the complaint is also adequate to set forth the offense.

The "essential facts" of an indictment may be the facts of a particular violation expressed in the terms of the statute allegedly violated. If the details of the accusation are desired, a bill of particulars must be sought. *United States* v. *Debrow,* 346 U. S. 374, 376. If such a bill is not requested, the indictment is sufficient to withstand the later claim that it fails to allege sufficient essential facts.

A complaint drawn in terms of the statute allegedly violated should be accorded the same treatment. Petitioner is not entitled to a bill of particulars but he is entitled to a preliminary hearing, where he can learn even more of the evidentiary details than would be found in a bill of particulars. If he waives preliminary hearing, the complaint should thereafter be viewed as sufficient to withstand the claim that the essential facts were not alleged.

If the facts alleged in the complaint—that petitioner received and concealed heroin on January 26, 1956, in Houston, Texas—are taken as true, an offense is made out. No specific intent or state of mind is necessary, and no evidentiary facts giving rise to an inference of intent need be mentioned. In such a case as this, the facts and the complainant's conclusion from the facts are one and the same. Even now, petitioner cannot point out any crucial omission. Hence,

the complaint states a complete narcotics offense under 21 U. S. C. 174.

ARGUMENT

There is involved in this case only a search of the person incident to an arrest. It is therefore undisputed that, if the arrest was valid or is not now subject to challenge, the search must be sustained. This Court has consistently held that, given a lawful arrest, the body and clothing of the arrested person may be subjected to search, and this principle has not been disputed in any of the recent cases dealing with the precise scope of the Fourth Amendment's ban on "unreasonable searches and seizures." *Kremen* v. *United States,* 353 U. S. 346, 347; *United States* v. *Jeffers,* 342 U. S. 48, 51; *United States* v. *Rabinowitz,* 339 U. S. 56, 60; *Johnson* v. *United States,* 333 U. S. 10, 15; *Harris* v. *United States,* 331 U. S. 145, 150; *United States* v. *Di Re,* 332 U. S. 581, 587; compare Frankfurter, J., dissenting in *Davis* v. *United States,* 328 U. S. 582, 609–610, and in *Harris* v. *United States, supra,* at 164–165.

It is the government's position that the arrest in this case was legal, irrespective of the validity of the warrant, under Texas statutes relating to narcotics offenses. Resolution of this issue depends upon an analysis of Texas law which we discuss in Point I, *infra.* We further contend in Point II, *infra,* that petitioner waived the alleged defect in the warrant of arrest by waiving a preliminary hearing before the Commissioner. On either basis, the motion to suppress was properly denied.

I

HAVING PROBABLE CAUSE TO BELIEVE THAT PETITIONER HAD COMMITTED A NARCOTICS OFFENSE, THE OFFICERS WERE FULLY AUTHORIZED TO ARREST HIM WITHOUT A WARRANT

We believe that petitioner was lawfully arrested and hence, that the search of his person was valid even if the warrant of arrest is disregarded.[1] Possession of an insufficient warrant does not render illegal an arrest which could lawfully be made without it. *United States* v. *Rabinowitz*, 339 U. S. 56, 60; *Go-Bart Importing Co., et al.* v. *United States*, 282 U. S. 344, 356; *Stallings* v. *Splain*, 253 U. S. 339, 342. Room remains to show that the arrest was otherwise valid. We submit that the officers had authority under State law to arrest without a warrant for narcotics offenses, on probable cause to believe that the offenses had been committed; and we also submit that the officers here did in fact have probable cause for the arrest.

A. TEXAS LAW PERMITS ARRESTS FOR NARCOTIC VIOLATIONS, WITHOUT WARRANT, ON PROBABLE CAUSE

This Court has held that "* * * in absence of an applicable federal statute the law of the State where an arrest without warrant takes place determines its validity", *United States* v. *Di Re, supra*, 332 U. S. at 589; *Johnson* v. *United States, supra*, 333 U. S. at 15.

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[1] The decision of the Court of Appeals was not put on this ground. A respondent may, however, support the judgment below on any proper ground even if it was not the basis of the ruling of the lower court and even if it was not argued by the respondent below. *Langnes* v. *Green*, 282 U. S. 531, 535–539; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547; *United States* v. *Ballard*, 322 U. S. 78, 88.

At the time of the government's brief in opposition to the petition for a writ of certiorari, it was believed that the arrest here was governed by general Texas law that an arrest without a warrant is authorized only "upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape." Code of Criminal Procedure, Vernon's Annotated Texas Statutes, Article 215. Further research since the grant of certiorari has, however, disclosed that there are Texas statutes, cited *supra*, pp 2–3, relating specifically to narcotics offenses,[2] and that these statutes have been interpreted by Texas courts as authorizing arrest without a warrant on probable cause to believe that narcotics violations have been committed.[3] On the basis of Texas law, which we discuss below, we submit that the arrest was lawful without regard to the validity of the warrant.

Section 14 of Article 725–b of the Texas Penal Code, quoted *supra*, p. 2, declares all narcotic drugs, including heroin (Section 1 (12), Article 725–b), to be contraband. Section 15, quoted *supra*, pp. 2–3, provides that peace officers shall have the "power and au-

[2] There are specific statutes in other fields as well. See, for example, Texas Code of Criminal Procedure, Vernon's Annotated Texas Statutes, Article 325 (arrest of thief without warrant on probable cause and seizure of stolen property), and Texas Penal Code, Article 487 (arrest without warrant on probable cause for violations involving firearms).

[3] It should be noted that under present federal law, 26 U. S. C., Supp. IV, 7607, added July 18, 1956, the arrest in this case would have been valid, without regard to the validity of the warrant, since a narcotic agent is given authority to make arrests where he "has reasonable grounds to believe that the person to be arrested has committed" a narcotics offense.

thority, without warrant, to open and examine any box, parcel, package or receptacle *in the possession of any person* which they have reason to believe, and do believe contain narcotic drugs * * *"[4] (Emphasis added.)

The Texas courts have put a gloss of construction on this statute, reading it so as to authorize arrests without warrant on probable cause, as well as searches without warrant on probable cause. *Giacona* v. *State,* 298 S. W. 2d 587, 588–589; *Thomas* v. *State,* 288 S. W. 2d 791, 792; *Palacio* v. *State,* 283 S. W. 2d 765; *Gonzales* v. *State,* 160 Tex. Crim. 548, 272 S. W. 2d 524, 525, overruled on other grounds by *Thomas* v. *State, supra,* at 793. While the language of the statute speaks of searches without warrant, including searches of the person—and a statute may authorize a search without a warrant, based on probable cause, independent of any power to arrest[5]—the Texas court in *Thomas* v. *State,* 288 S. W. 2d 791, 792, clearly implied that every search of the person without a warrant must be incidental to a legal arrest. See, also, *Giacona* v. *State, supra,* 298 S. W. 2d 587, 588–589; and Note, 35 Texas L. R. 270, 271. The net effect of the Texas statutes, as interpreted by the Texas courts, as we read those decisions, is that officers are authorized to arrest, without a warrant, on

[4] Members of the Houston police department are peace officers with authority to enforce the narcotics statutes. *French* v. *State,* 284 S. W. 2d 359, 360.

[5] *Carroll* v. *United States,* 267 U. S. 132, 158; *Odenthal* v. *State,* 106 Tex. Crim. 1, 9, 290 S. W. 743, 746; *Battle* v. *State,* 105 Tex. Crim. 568, 570, 290 S. W. 762, 763.

probable cause to believe that a narcotics offense has been committed.

Here, the officers had not only probable cause to believe that petitioner had committed a narcotics offense, but had reason to believe that petitioner then and there had narcotics on his person (see *infra*, pp. 21–22). Thus, under Texas law, the Texas officer and the federal officer (whose right to arrest depended on state law) had the power to make an arrest for narcotics violations without a warrant.

B. SINCE THE OFFICERS HAD TRUSTWORTHY INFORMATION THAT PETITIONER POSSESSED A LARGE SUPPLY OF NARCOTICS AND PETITIONERS SUSPICIOUS ACTIONS PRIOR TO ARREST CORROBORATED THEIR INFORMATION, THE OFFICERS HAD PROBABLE CAUSE TO ARREST PETITIONER FOR NARCOTICS VIOLATIONS

Whether the standard of probable cause be as defined in the federal or the Texas cases, there was probable cause for the arrest and search of petitioner.

In *Brinegar* v. *United States*, 338 U. S. 160, 175–176, this Court defined probable cause as follows:

> Probable cause exists where "the facts and circumstances within their [the officers'] knowledge *and of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed * * *. [Emphasis added.]

The Court rejected (338 U. S. at 174, n. 13) the earlier dictum of *Grau* v. *United States*, 287 U. S. 124, 128, to the effect that the facts giving rise to probable cause must be evidence which is competent to convict, and disapproved of the proposition that proof of probable

cause in any given case depends upon fixed immutable requirements, saying (338 U. S. at 175):

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicans, act. The standard of proof is accordingly correlative to what must be proved.

and, at 176:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. *The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests* * * *." [Emphasis added.]

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* See also, *Carroll* v. *United States*, 267 U. S. 132, 161, where the Court quoted with approval the following passage from *Commonwealth* v. *Carey*, 12 Cush. 246, 251, "* * * but if he suspects one on his own knowledge of facts, *or on facts communicated to him by others*, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." (Emphasis added.)

Brinegar thus put aside any rigid or formulary test of probable cause. The Court conditioned a finding of probable cause simply upon the nontechnical consideration of whether the facts would lead reasonable men sensibly to their conclusions of probability." And the *reliability* of these facts was made the critical question, not whether the information would be admissible in a judicial proceeding. See, also, *Husty* v. *United States*, 282 U. S. 694, 700–701; *United States* v. *Sebo*, 101 F. 2d 889, 890 (C. A. 7).[1]

Texas law defines probable cause as:

> A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. [*Landa* v. *Obert*, 45 Tex. 539, as quoted in *Thomas* v. *State*, *supra*, 288 S. W. 2d 791, 792 (Tex.).]

[1] Cf. *Costello* v. *United States*, 350 U. S. 359, in which this Court affirmed a conviction, deriving from an indictment valid on its face, but which was returned by the grand jury solely on hearsay evidence. If hearsay evidence may support an indictment which results in trial and conviction, it follows that *reliable* hearsay (cf. Mr. Justice Burton, concurring, at 350 U. S. 359, 364–365), may constitute probable cause to make an arrest. See *King* v. *United States*, 1 F. 2d 931 (C. A. 9); *United States* v. *Heitner*, 149 F. 2d 105, 106 (C. A. 2), certiorari denied, *sub nom. Cryne* v. *United States*, 326 U. S. 727; *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Mueller* v. *Powell*, 203 F. 2d 797 (C. A. 8); *Cannon, et al.* v. *United States*, 158 F. 2d 952 (C. A. 5), certiorari denied, 330 U. S. 839; *United States* v. *Walker*, 246 F. 2d 519, 527–528 (C. A. 7); *Browner* v. *United States*, 215 F. 2d 753, 754 (C. A. 6); *Somer* v. *United States*, 138 F. 2d 790, 791 (C. A. 2).

This is no less rigorous a standard in phraseology than that forged by this Court in *Brinegar* v. *United States,* 338 U. S. 160, 175–176, and, in its application, the Texas standard is rather more rigorous. Thus, in Texas, "* * * the [arresting] officer [must] have some information that the accused was violating the law *plus* some act on the part of an accused which would bolster and support such belief." *Thomas* v. *State, supra,* at 793. Here, the officers did have credible information that petitioner was in possession of narcotics and his suspicious actions, which they observed just prior to the arrest, lent support to their belief that he was violating the law.

Agent Finley had been informed by other law enforcement officials that petitioner was in Houston with a large quantity of heroin, and that petitioner had planned to and did go to Chicago, Illinois, to obtain the narcotics. Furthermore, Finley had personally observed petitioner's return to Houston in an automobile bearing Illinois license plates. When Finley and Shelton took up their surveillance on January 27, 1956, they saw the petitioner return to his home. In a few minutes, petitioner emerged in the company of a "character" well known to the Houston police. The two men drove off in two cars, yet they were obviously travelling together for the cars proceeded bumper-to-bumper. After driving to a residential area of Houston, petitioner and his friend stopped and conferred for a few minutes. Petitioner then drove to a Brownsville Street address, parked, and entered a house. The friend parked across the street

about 1½ blocks away from this residence and waited.* After petitioner emerged from the house and its garage, Finley and Shelton could see that he was carrying a brown paper bag or envelope and was about to depart in his car.

When all that the officers had observed is coupled with their information that petitioner had just returned to Houston with a large supply of heroin, they could reasonably conclude that petitioner and his associate did not want to be seen at or in front of the Brownsville Street address because their trip was not an innocent one; that they planned a narcotics transaction; that the Brownsville address was the hiding place of petitioner's cache of narcotics; and that petitioner, at the moment of arrest, was about to deliver a supply of heroin. Small quantities of narcotics are usually held for personal use, large quantities for sale; the officers had information that petitioner was concealing a large quantity.

Finley and Shelton were not required to separate each particular fact from its context and discover its individual significance. Each fact was not isolated, and reasonable minds would not evaluate the facts separately. Therefore, even though some of the facts, standing alone, might be consistent with petitioner's innocence of any wrongdoing, what is important is that petitioner's actions, as observed by the agents,

* The evidence concerning the presence and movements of petitioner's companion is mainly to be found in the testimony of officer Shelton, who testified at the trial but not at the hearing on the motion to suppress. However, the validity of a search is to be tested by the whole of the evidence presented, both on the motion and at trial. *Carroll* v. *United States*, 267 U. S. 132, 162; *Rent* v. *United States*, 209 F. 2d 893, 896 (C. A. 5).

tended to support the information they had received that petitioner had narcotics available for disposal.

The record, of course, does not disclose the precise reasoning of each of the officers who acted together in response to the situation with which they were confronted. The crucial issue is whether the facts known to the officers justified the action which they took. The officers might have attempted to execute the warrant when petitioner first emerged from his house. But surely they were not wrong in delaying their action for a short time for the purpose of observing further the acts of petitioner, in order to get some clues as to where the suspected narcotics were hidden. Similarly, the fact that they might have wished, on valid grounds, to seize fruits of the crime as well as to make an arrest does not render the arrest improper. They would have been entitled to search petitioner's person no matter when they arrested him, and the officers did not wait until petitioner was inside a building in order to search the building incident to an arrest. Petitioner was arrested on the street. The fact that the arrest was delayed until it was believed the fruits of the crime could be recovered does not render the action improper law enforcement.

Delaying the arrest seems fully justified in the light of *Scher* v. *United States*, 305 U. S. 251. There, federal officers observed defendant's actions for a period of several hours and then followed his "apparently heavily loaded" automobile for a distance of some five blocks until defendant reached his home. Defendant parked his car in a garage within the curtilage and

was arrested for violating the liquor laws as he was getting out of the automobile. The Court noted that defendant could have been stopped on the street and arrested, and held that passage of the car into the open garage did not destroy that right to arrest. When *Scher* is applied here, it would indicate that the delay in arresting petitioner, to permit further lawful investigation, did not vitiate the subsequent arrest.

The test of whether an arrest is justifiable as based on probable cause is one of reasonable deduction, not proof beyond a reasonable doubt. Here, there was probable cause for the arrest without regard to the fruits of the search. Under Texas law, as construed by the Texas courts, we submit the search was proper as incident to a lawful arrest without regard to the validity of the arrest warrant.

II

BY WAIVING PRELIMINARY HEARING, THE PETITIONER WAIVED THE ALLEGED DEFECTS IN THE WARRANT OF ARREST

Petitioner contends that the Court of Appeals erred in holding that he waived all questions in connection with the validity of his arrest by waiving the preliminary hearing after arrest. He presses for the theory, adopted by the dissent below, that waiver of the preliminary hearing does not waive anything with respect to the legality of the arrest.

The question of what grounds for challenging an arrest remain open to a defendant who, with the advice of counsel, waives a preliminary hearing after

that arrest, is one which has not been fully explored by the courts. Clearly, by waiving a preliminary hearing, a defendant does waive the right to assert that he cannot thereafter legally be held in custody, *United States* v. *Walker*, 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877. He would thereby waive any question of identity, and he would waive any technical irregularity in the complaint or warrant, especially one appearing on the face of the complaint or warrant. *United States* v. *Ruroede*, 220 Fed. 210, 213–214 (S. D. N. Y.). This waiver would encompass such questions as relate to identity, misspelled names, and incomplete designation. The precise issue raised by this case is whether waiver of the preliminary hearing also waives questions relating to the validity of the warrant issued prior to the arrest, where the ground upon which the warrant is challenged is that the complainant who alleged personal knowledge of the facts which gave rise to probable cause lacked such personal knowledge. We believe that, under all the facts and circumstances of this case, this alleged defect is also waived by a waiver of a preliminary hearing.

In our view, the issue of whether probable cause exists to continue the person arrested under detention—the issue which would be raised at a preliminary hearing under Rule 5 (c) of the Federal Rules of Criminal Procedure—is, in the overwhelming majority of cases, inextricably involved in the question whether probable cause existed to justify issuance of the warrant in the first instance. Therefore, it is not unreasonable, and makes for an orderly and expeditious dis-

position of this issue, to hold that the waiver of preliminary hearing waives all defects of a technical nature relating to the manner in which the accused has been brought before the Commissioner.

At a preliminary hearing, defendants are entitled to be represented by counsel, as was this petitioner (R. 9), and may demand that the evidence against them be brought forward. Defendants are permitted, through counsel, to cross-examine the witnesses and present evidence in their own behalf. We suggest that this is the time, at the very outset of the criminal proceeding, when defendants should raise any technical defects in the manner in which they were arrested. In many instances, the defects are of such a nature that they can be promptly corrected. In other instances, entirely new proceedings against the accused must and can be initiated. Requiring defendants to raise questions relating to the manner of their arrest at this initial stage of the criminal proceedings, if they would ever raise such questions, would not impose an undue burden upon the accused, and would enable the cases to be either dismissed—perhaps in favor of some new action—or proceed to disposition on the merits.

We note that the basis for challenge here—that the complaint alleged that it was made on personal knowledge, when, in fact, it was based in part on reliable information—is one which, although not appearing on the face of the complaint, goes to the manner of arrest itself rather than to the seizure of the bag of heroin which was incident to that arrest. Thus, we are not faced with the question whether a waiver of

preliminary hearing waives questions other than those relating to an arrest itself—for example, such questions as whether the search which followed the arrest went beyond permissible bounds.* We urge merely that where, as here, the alleged defect goes to the arrest as such, rather than to collateral matters such as the extent of a search, the waiver of a preliminary hearing waives standing to challenge the validity of the very arrest which brought the accused before the Commissioner for that preliminary hearing.

Neither is the Court called upon in this case to determine whether waiver of a preliminary hearing would preclude a defendant from asserting that the arrest was without sufficient probable cause to meet Fourth Amendment requirements governing a search of premises incident to an arrest. Nor is there any question here whether, if the complainant did not have probable cause to request the warrant—did not have knowledge, personally or through reliable hearsay of the facts which he alleged he did know—a defendant could, after waiving preliminary hearing, challenge the arrest for the purpose of challenging the search. In this case the complainant did in fact have probable cause to believe that an offense had been committed and that petitioner had committed it. The fact that the complainant had not shown an awareness of the distinction between facts which he knew on his own observation and facts which he knew because of reliable information obtained from others is the kind of defect

* There was no search of any premises here; the agents merely seized the bag petitioner was carrying in his hand. (See p. 5, *supra*.)

which a defendant should challenge at the first opportunity, if he is going to challenge it at all. This type of error is the kind which lawyers have found it easy to make. See *De Hardit* v. *United States,* 224 F. 2d 673 (C. A. 4), certiorari denied, 350 U. S. 863. And the courts have treated this kind of error as a technical rather than a basic defect. See *Rice* v. *Ames,* 180 U. S. 371, 376, *United States* v. *Walker,* 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877.

Although agent Finley acted on the basis partly of credible information and belief, rather than entirely personal knowledge, when he swore to the complaint, this is not a case where there was any overreaching. From Finley's testimony (R. 16–19) it appears that at the time of the motion to suppress he was not even aware of the distinction.

As pointed out *supra,* p. 6, Finley had information from other law enforcement officials that petitioner had a large supply of heroin on hand which he had obtained in Chicago.[10] Finley's earlier surveillance had confirmed a part of this information, and its source was of a sort regarded as credible by the Texas cases in other instances where probable cause was in issue. See *Hatfield* v. *State,* 161 Tex. Cr. 362, 276 S. W. 2d 829; *Brasselton* v. *State,* 112 Tex. Crim. 615, 18 S. W. 2d 168, 169. Cf. *Costello* v. *United States,* 350 U. S. 359–363. Hence the quality

[10] Narcotic drugs are subject to internal revenue tax, 26 U. S. C., Supp. IV, 4701, and Finley therefore was a revenue agent. 5 U. S. C. 281c, 282a; see *United States* v. *Jones,* 204 F. 2d 745, 752–753 (C. A. 7), certiorari denied, 346 U. S. 854. Hence, the warrant of arrest could issue without the approval of a United States Attorney. 18 U. S. C. 3045.

of the information believed by the officers upon which they acted is not open to question. If petitioner through his counsel had chosen at the preliminary hearing to raise an issue as to the sufficiency of Finley's knowledge, Finley could have shown probable cause for the complaint. Finley could then have been called upon to spell out the details which petitioner complains are missing from the complaint, to specify what was personal knowledge and what was knowledge based on information from others. By waiving preliminary hearing, petitioner in effect admitted through counsel that Finley did have sufficient basis to arrest him. Petitioner should be held, for the purposes of this case and for the reasons stated above, to that position. He should not be allowed now to assert that he was illegally taken into custody.

III

THE COMPLAINT ADEQUATELY STATES THE ESSENTIAL FACTS OF THE OFFENSE

The dissenting judge below thought, and petitioner argues here, that, regardless of "probable cause", the complaint was deficient in that it did not meet the requirement of Rule 3, F. R. Crim. P., that the complaint must contain "the essential facts constituting the offense charged". This is a challenge to the sufficiency of the complaint for failure to allege sufficient detail and we think is in the same category as a misspelled name or other technical defect appearing on the face of the complaint. For the reasons set forth in Point II above, we think such an alleged defect was waived by waiver of preliminary hearing.

The argument is, in any event, without merit. The complaint sufficiently states, in the terms of the statute, that petitioner received and concealed heroin hydrochloride, a narcotic drug, with knowledge of its unlawful importation. See 21 U. S. C. 174. Since an indictment in the words of this statute is sufficient (*Brown* v. *United States,* 222 F. 2d 293, 295–296 (C. A. 9); *United States* v. *Rodgers,* 218 F. 2d 536, 537–538 (C. A. 5); *Aeby* v. *United States,* 206 F. 2d 296, 297–298 (C. A. 5), certiorari denied, 346 U. S. 885; *Pon Wing Quong* v. *United States,* 111 F. 2d 751, 754–755 (C. A. 9); see *United States* v. *Valdes,* 229 F. 2d 145, 147 (C. A. 2), certiorari denied, 350 U. S. 996), a complaint in the same form should also be sufficient. *United States* v. *Walker, supra,* 197 F. 2d 287, 289.

Rule 3, F. R. Crim. P., defines a complaint as "a written statement of the essential facts constituting the offense charged." Similarly, Rule 7 (c), F. R. Crim. P., provides that "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The illustrative forms which accompany the Rules make it clear that an allegation of the minimum facts of the offense states enough "essential facts" to set forth an offense in an indictment or information.[11]

[11] See F. R. Crim. P., App. of Forms. For example, a violation of 26 U. S. C., Supp. IV, 5176, which requires the bonding of distillers before operations begin or are continued, is alleged by the statement that defendant "carried on the business of a distiller without having given bond as required by law", even though the facts giving rise to the characterization of "busi-

We do not say it is enough, in either a complaint or an indictment, merely to name the offense allegedly committed. A contemporary interpretation of Rule 7 (c), *supra,* was given by Mr., now Judge, Alexander Holtzoff, who served as secretary of the Advisory Committee on Federal Rules of Criminal Procedure. In speaking of this rule he said (Holtzoff, *Reform of Federal Criminal Procedure,* 12 Geo. Wash. L. R. 119, 125–126):

> The form adopted by the Committee is not what is technically known as the short form indictment, which merely names the crime with which the defendant is charged, by its legal term, without specifying or summarizing the facts of the offense. The Committee deliberately rejected indictments of this type, because they are apt to evoke motions for bills of particulars and thereby constitute a source of unnecessary delay. A simple indictment, briefly and succinctly setting forth the facts of the specific crime, seems far preferable.

It follows that the "essential facts" requirement of Rule 7 (c), *supra,* demands more than a mere characterization of the offense committed. It means that a short statement of the necessary facts must be set forth. Hence, to ascribe the same meaning to the "essential facts" requirement of Rule 3, *supra,* does no violence to the older concept that a complaint should fairly state the substance of the offense charged to justify issuance of a warrant. See *Ex parte Van Hoven,* Fed. Cas. No. 16,858 (C. C. D. Minn.).

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ness" and "distiller" are not spelled out. See Form 5, App. of Forms, *supra.*

There is no reason to suppose that the words "essential facts" used in both Rules 3 and 7 (c) are to be given different content in each rule, especially since both rules are concerned with steps in the initiation of prosecution. Indeed, there is a general principle that a word used in several places in a single piece of legislation—even though it could encompass diverse concepts—should be given but one meaning throughout, unless the context clearly requires that several meanings be implied. *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582, 587; *United States* v. *Cooper Corporation et al.*, 312 U. S. 600, 607; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. Here, the different settings in which the phrase "essential facts" appears does not require that a change in meaning be accorded it, and none of the members of the Advisory Committee on Federal Rules of Criminal Procedure who have published their views have expressed an awareness of any intent to require a shift in purport. See, for example, Holtzoff, *Reform of Federal Criminal Procedure, supra;* Orfield, *The Federal Rules of Criminal Procedure*, 26 Neb. L. R. 570, 574, 580; Robinson, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jud. S. 38, 45; Waite, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jud. S. 101, 103; and Medalie, *Federal Rules of Criminal Procedure*, 4 Lawyers' Guild Rev. (3) 1, 3.

The view of the dissenting judge below that a complaint should be more specific than an indictment because an indictment may be supplemented by a bill of

particulars ignores the fact that Rule 7 requires that the indictment itself state the "essential facts", just as Rule 3 requires that the complaint state the "essential facts". And the requirement that an indictment state the elements of the offense is quite apart from the right to learn the details of the accusation by obtaining a bill of particulars. *United States* v. *Debrow*, 346 U. S. 374, 376; *Hagner* v. *United States*, 285 U. S. 427, 431. If an indictment framed in terms of the narcotics statute is sufficient, it must be on the basis that the terms of the statute state an offense. Hence the "essential facts" of an indictment may be the facts of a particular violation expressed in the terms of the statute violated. *United States* v. *Debrow, supra; United States* v. *Smith*, 232 F. 2d 570, 572 (C. A. 3); *United States* v. *Williams*, 203 F. 2d 572, 573–574 (C. A. 5), certiorari denied, 346 U. S. 822.[12] Under Rule 7 the defendant is entitled to learn the particulars by appropriate motion, but this is separate and apart from the requirement that the indictment state an offense—that it state the essential facts. In the case of a complaint the defendant is not entitled to a bill of particulars but he is entitled to a preliminary hearing. At that time he can insist that evidence against him be presented, Rule 5 (a), F. R. Crim. P., and in that fashion learn even more of the evidentiary details than he can learn from a bill of

[12] For example, the "essential facts" of an indictment for first degree murder of a Federal officer are that, on or about a certain date in a certain District, defendant with premeditation and by means of shooting, murdered X, who was a Federal officer engaged in the performance of his duties, Form 1, *supra*, F. R. Crim. P., App. of Forms.

particulars. Once again, however, this right is separate from the requirement that the complaint state the essential facts, that it state an offense. The right to a hearing is provided for by a different rule and serves different purposes.

The view that we urge is peculiarly appropriate when applied to a narcotics case such as this. The offense is essentially a simple one. Mere possession is prima facie a violation of the statute. See *Casey* v. *United States,* 276 U. S. 413. If the facts alleged in the complaint, that petitioner received and concealed heroin on January 26, 1956, at Houston, Texas, are taken as true, then—without elaboration—an offense is made out. Unlike other criminal offenses, no specific intent or state of mind is required, hence there was no need to spell out facts tending to give rise to an inference of intent. At least in a narcotics case, the distinction which petitioner seeks to draw between the facts and the complainant's conclusion from the facts (Pet. Br. 13) has little utility. They are the one and the same. An information couched in terms of the statute would not be bad as pleading mere conclusions, *Myers* v. *United States,* 15 F. 2d 977, 979 (C. A. 8). A complaint so phrased should also be deemed sufficient.

It is noteworthy that petitioner did not assert that the complaint was inadequate to allege the essential facts until after trial, when he filed his motion for a new trial (R. 55). His motion to suppress was put on the general theory that the complaint was insufficient, but the entire thrust of his showing on the pre-trial motion went to the issue of probable cause,

not to the adequacy of allegation in the complaint. Even now he is unable to point out any crucial omission. The fact is, we submit, that a statement that petitioner was receiving and concealing heroin was a complete statement of a narcotics offense under 21 U. S. C. 174.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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